Supreme Court, U.S.
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In the

Supreme Court of the United States

CLARA VARCO,

Petitioner,

v.

ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

a) Whether the decision of the Seventh Circuit Court of Appeals conflicts with this Court's decision in *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), which denied federal subject matter jurisdiction under § 502(a)(3) of ERISA to a Plan Administrator seeking reimbursement for benefits from a participant who recovers money from a third party.

b) Whether the decision of the Seventh Circuit Court of Appeals conflicts with the decision of the Ninth Circuit Court of Appeals in *Westaff, Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002), *cert. denied*, 537 U.S. 1111 (2003).

c) Whether the decision of the Seventh Circuit panel conflicts with other decisions of the Seventh Circuit Court of Appeals.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner, Clara Varco, is an individual citizen of the United States residing in the Northern District of Illinois. She has no corporate affiliations. Initially, Clara Varco was the plaintiff in a personal injury action in the Circuit Court of Cook County, which was removed to the Federal District Court for the Northern District of Illinois. After remand, she was the defendant in the proceedings in the Federal District Court for the Northern District of Illinois, and the appellant, and appellee, in two separate and consolidated appeals in the Seventh Circuit Court of Appeals.

Respondent

Respondent, Administrative Committee of Wal-Mart Stores Inc. Associates' Health and Welfare Plan, is a fiduciary of the ERISA plan providing health and retirement benefits to employees of Wal-Mart Stores, Inc. Petitioner is unaware if Wal-Mart Stores, Inc. owns or controls any portion of the plan. Petitioner is unaware of any publicly held company owning ten (10%) percent or more of the Plan. The Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan was a self proclaimed "defendant" in Ms. Varco's personal injury lawsuit in the Circuit Court of Cook County, which it then removed to the Federal District Court for the Northern District of Illinois. Following remand, the Plan was the plaintiff in the proceedings in the Federal District Court for the Northern District of Illinois, and the appellee and appellant in separate and consolidated appeals in the Seventh Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the opinion of the Seventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Seventh Circuit (App. B) was entered on July 29, 2003, and is reported at 338 F.3d 680 (7th Cir. 2003). The order denying petition for rehearing *en banc* (App. A) was entered by the Seventh Circuit Court of Appeals on August 22, 2003, and is reported at 2003 U.S. App. LEXIS 17772 (7th Cir. 2002). The opinion of the United States District Court for the Northern District of Illinois granting summary judgment to respondent (App. D) was issued on October 2, 2002, and it is reported at 2002 U.S. Dist. Lexis 18933 (N.D. Ill. 2002). The order of the United States District Court for the Northern District of Illinois, denying petitioner's motion to dismiss for lack of subject matter jurisdiction (App. E at 50-52) was entered on January 14, 2002, and is reported at 2002 U.S. Dist. Lexis 530, (N.D. Ill. 2002). The opinion of the United States District Court for the Northern District of Illinois, remanding the plan's removal of Varco's personal injury action (App. G) is reported as *Varco v. Lapsis*, 172 F. Supp. 2d 985 (N.D. Ill. 2001)

STATEMENT OF JURISDICTION

The opinion of the Seventh Circuit Court of Appeals was entered on July 29, 2003. (App. B) The Court of Appeals entered an order denying a timely petition for rehearing *en banc* on August 22, 2003. (App. A). Justice Stevens granted an extension of time in which to file a Petition for a Writ of Certiorari to and including January 19, 2004.

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

The operative statutory provision, §502(a)(3) of the Employee Retirement Income Security Act of 1974, found at 29 U.S.C. § 1132(a)(3) provides:

> (a) Persons empowered to bring a civil action. A civil action may be brought—
>
> * * *
>
> (3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

STATEMENT OF THE CASE

Clara Varco sustained injuries in an automobile collision in Orland Park, Illinois on September 24, 2000. She was and still is employed by Wal-Mart. As part of her employment, she was allowed to, and did participate in an ERISA qualified benefits plan which paid some of her medical bills related to the injury she received in the automobile collision. The Administrative Committee of the Wal-Mart Stores, Inc. Associates Health & Welfare Plan (the plan) provides health benefits to employees of Wal-Mart stores, and paid a total of $18,865.72 to various medical providers, for treatment related to Ms. Varco's injuries. (App. B at 3a- 4a)

Ms. Varco's attorney secured settlements totaling $100,000.00,[1] and thereafter her attorney filed a petition to adjudicate various liens and other claims against the settlement proceeds, including a claim for reimbursement by the plan. (App. B at 4a). The petition to adjudicate the liens was filed in the Circuit Court of Cook County, where Ms. Varco's personal injury lawsuit was pending (App. D at 28a; h). In response to the petition to adjudicate liens, the plan filed a Notice of Removal, identifying itself as a "defendant." (Appendix I). The Notice of Removal was remanded by Judge Alesia, for lack of subject matter jurisdiction. (App. G) *Varco v. Lapsis*, 172 F. Supp. 2d 985 (N.D. Ill. 2001).

While the petition to remand remained pending before Judge Alesia, the plan filed this action, alleging federal question subject matter jurisdiction, pursuant to 28 U.S.C. §§ 1331 and 1332, and § 502(a)(3) of the Employee Retirement Income Security Act, 29 U.S.C. § 1132. (App. F) The First Amended Verified Complaint alleged that Ms. Varco was a participant of the plan, that she was injured in a motor vehicle collision, and as a result, the plan paid medical benefits totaling $34,035.55.[2] The complaint further alleged that the plan's contract with Varco provided that the plan was entitled to reimbursement of those monies in the event Varco successfully recovered from another source. It was further alleged that Varco refused to reimburse the plan in accordance with the plan's terms. As a result, the plan sought to enforce

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[1] Varco initially accepted an offer of $20,000.00 from the tortfeasor's insurance carrier, and subsequently accepted from her own under-insured motorist coverage the remaining $80,000.00.

[2] The plan later admitted it had not paid $34,035.55, and filed an amended affidavit, claiming that it had paid $18, 865.72. (App. B at 5a)

the contract, by way of injunction, declaratory judgment, constructive trust or restitution, "requiring defendant Varco to turn over $34,035.55, including appropriate pre-judgment and post judgment interest." (App. F)

Subsequent to the filing of the First Amended Complaint, Varco filed a motion to dismiss, for among other reasons, lack of federal subject matter jurisdiction. In the interim, on January 8, 2002, this Court issued its opinion in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 202 (2002). Several days later, on January 14, 2002, Judge Lefkow issued a Memorandum Opinion denying Varco's motion to dismiss for lack of federal subject matter jurisdiction. (App. E at 47a-49a). Varco filed a timely interlocutory appeal. (App. B at 3a). Thereafter, the parties filed cross motions for summary judgment, and the District Court granted the plaintiff's motion for summary judgment, on October 10, 2002. (App. C) The order granting summary judgement found that the plan was entitled to reimbursement pursuant to the terms of the plan, (a fact which Varco never disputed[3]), but that in accordance with the Common Fund Doctrine, Varco was entitled to credits for the plan's pro-rata share of attorneys fees and costs attributable to the recovery. (App. D at 37a-40a)

Varco filed an interlocutory appeal of the decision issuing a preliminary injunction, and denying her motion to dismiss for lack of subject matter jurisdiction. (App B at 6a) After the trial court granted summary judgment, the plan appealed the finding that the Illinois Common Fund Doctrine applied to

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[3] Varco has never disputed her obligation to reimburse the plan. Her original petition to adjudicate liens and claims for reimbursement, merely sought to reduce those claims by each claimant's pro rata share of the attorneys fees and costs in accordance with the Common Fund Doctrine. (Appendix H).

the plan's claim for reimbursement. Those appeals were consolidated. (App. B at 7a) The panel below, in an opinion issued by the Seventh Circuit Court of Appeals affirmed the trial court's denial of Varco's motion to dismiss, and reversed the trial court's finding that the Illinois Common Fund Doctrine applied to an ERISA plan's suit to enforce its contractual right to reimbursement. (App. B)

REASONS FOR GRANTING THE PETITION

Few other issues relating to ERISA have been the subject of such relentless, and untiring efforts at establishing subject matter jurisdiction notwithstanding mounting precedent to the contrary. The important question at hand is whether § 502(a)(3) of the Employment Retirement Income Security Act grants federal question subject matter jurisdiction to an ERISA plan administrator's suit seeking reimbursement of monies recovered by one of its participants in a personal injury lawsuit. The federal courts of appeals have repeatedly addressed this issue; the federal district courts have published numerous opinions on the issue; and, this Court has ruled, that such claims were not within federal question subject matter jurisdiction in *Great West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204 (2002). Notwithstanding being repeatedly rebuked, plan administrators continue to file suits in the federal district courts, and/or remove state court personal injury claims to federal court seeking to intercept the proceeds of personal injury lawsuits, and force repayment, often without sharing in the costs and fees associated with the recovery of that money. To date, this Court and the United States Courts of Appeals have steadfastly prohibited these claims for reimbursement from being litigated in the federal courts. The decision below, however, ignores the precedent established by this Court in *Knudson*, and followed by the other circuits, and instead, determined that in cases where the

money recovered by a personal injury plaintiff is segregated and identifiable, a plan may rightly bring a claim to impose a constructive trust, pursuant to the "other equitable relief" provision of § 502(a)(3).

Since personal injury claims are required by ethical constraints to be paid from plaintiffs' attorneys "client trust fund account,"[4] most, if not all such payments, are segregated and identifiable. In so deciding, the panel below not only breaks with binding precedent and creates conflict among the circuits, it also opens the doors to the federal court houses throughout the country, where the district judges will be called upon to act as the final arbiter in virtually all personal injury claims in which an ERISA plan made payments and now seeks reimbursement.

This, of course, is no small increase in the number of claims which now may be filed in or removed to the federal courts. In Cook County, Illinois alone, in 2001, there were over 607,000 pending lawsuits, a significant percentage of which involved claims of personal injury. (Annual report of Illinois courts, 2001). Over 150,000,000 Americans are participants of qualified ERISA plans, (www.dol.gov/ebsa/publications/apar_fy2002.html, maintained and published by the U.S. Department of Labor Employee Benefits Security Administration), and thus are provided medical benefits similar to those benefits paid on behalf of the petitioner in this case. Thus, it is fair to conclude that a substantial percentage of plaintiffs in lawsuits currently pending in Cook County alone, not to mention the nation as a whole, were filed by plaintiffs whose medical bills

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[4] *See*, ABA Model Code of Professional Responsibility, DR 9-102 (1980).

were paid in whole or in part by their qualified ERISA plan. As a result of the decision below, all ERISA plans may now rightly file suit in the federal district court to enforce its right to reimbursement, rather than litigate in the state courts, with all other lien holders, and abide by the orders of the state court judge. This decision greatly expands federal question subject matter jurisdiction, and will lead to a flood of federal litigation never contemplated or condoned by this Court's previous decisions.

There is a critical need for direction from this Court, as evidenced by continued litigation on an issue which this Court has only recently attempted to resolve. In light of apparent confusion as to the meaning and intent of this Court's most recent decision on this issue, as well as irreconcilable conflicts in decisions between the Seventh and Ninth, and other circuits, this petition should be granted, and the decision below, be reviewed.

I. The Decision of the Seventh Circuit Court of Appeals Conflicts with this Court's Recent Decision in *Great-West Life & Annuity Insurance Company v. Knudson,* 534 U.S. 204 (2002).

The decision below ignores the precedent set by this Court in *Great West Life & Annuity Insurance Company v. Knudson,* 534 U.S. 204 (2002). In that remarkably similar case, the Court addressed whether the federal courts could properly exercise subject matter jurisdiction over an ERISA plan's claim for reimbursement against a plan participant for monies paid by the plan and subsequently recovered by the participant as damages in a personal injury lawsuit. The Court specifically found that § 502(a) (3) of the Employment Security Act of 1974, 29 U.S.C. § 1132(a)(3)(1994 ed.) did

not authorize the federal courts to preside over an ERISA plan's claim for reimbursement. This Court was unpersuaded by the plan's attempt to convert a contractual claim for money damages into a claim for equitable relief, such as, injunctive, trust or restitution. *Knudson,* 534 U.S. at 210-219. The majority in *Knudson* specifically determined that the ERISA plan sought to "impose personal liability on respondents for a contractual obligation to pay money," noting that such relief was typically not available in equity. *Id.* at 210; quoting the Seventh Circuit's opinion in *Wal-Mart Stores, Inc. v. Wells,* 213 F3d 398, 401 (7th Cir. 2000). The majority further noted that "almost invariably...suits seeking (whether by judgment, injunction or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for "money damages" as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Knudson* 534 U.S. at 210. The Court also dismissed as unpersuasive, the petitioner's *amicus'* argument that a trust could be imposed as an equitable remedy under § 502(a)(3). *Id.* at 219. Ultimately, this Court finally and succinctly held that "[b]ecause petitioners are seeking legal relief – the imposition of personal liability on respondents for a contractual obligation to pay money – § 502(a)(3) does not authorize this action." *Id.* at 221.

Knudson, characterized the plan's attempt to label its claim for reimbursement as "equitable" as a "struggle" which the Court found unpersuasive. Likewise, in the instant case, the Committee's complaint is nothing more than a claim for money damages as a result of a claimed breach of a contractual duty to pay money. The complaint's factual

allegations allege nothing more against Petitioner[5] than that she was a participant in the Plan; that the plan paid monies on her behalf after she was injured in a motor vehicle accident; that subsequent to the accident she recovered monies from the tortfeasor; and, finally, that the plan has a contractual right to be reimbursed the full amount it paid as a result of the tortfeasor's negligence.[6] Based on those facts, the plan sought relief against Varco in two counts. Count I sought an injunction, Count II sought an injunction, or declaratory judgment specifically enforcing the contractual language of the plan, thus ordering petitioner to pay $34,035.55. Based on those facts, and legal theories, the plan sought in its prayer for relief, "an order granting a declaratory judgment, injunction, specific performance, constructive trust, and restitution against Varco, requiring Defendant Varco to turn over $34,035.55, including appropriate pre-judgment and post-judgment interest..."

In the present matter the analysis is virtually identical to that employed by this Court in *Knudson*. As this Court noted in *Knudson*, the relief sought by the ERISA plan's fiduciary was nothing "but a freestanding claim for money damages," and thus not within the subject matter jurisdiction created by § 502(a)(3). *Knudson*, 534 U.S. at 218. In the present case, the panel ignored that decision, and instead allowed Wal-Mart

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[5] The First Amended Complaint also alleged facts and claims in Counts III and IV against petitioner's attorney. Those claims have been dismissed, and the facts appear to have no bearing on the claims against petitioner now under consideration. (App. D at 31a).

[6] From the start petitioner has admitted the plan was entitled to reimbursement, but has sought reduction pursuant to the Illinois Common Fund Doctrine. (*See* Appendix, H, Varco's original petition to adjudicate.)

to transform a breach of contract action for money damages into an equitable claim to impose a constructive trust.[7] In so doing, the panel allowed Wal-Mart to distort the reality that it "wants the money, and claims that under the plan [the defendant] owes the money to it." *Primax Recoveries Inc. v. Sevilla*, 324 F.3d 544 547-548 (7th Cir. 2003). Further, the panel ignored the reality and the law that such a claim, "is a claim of breach of contract which is a classic legal claim.... Such games with form should be discouraged." *Id.* at 548. Notwithstanding the stern language of Justice Posner's opinion in *Primax*, and the clear intent of this Court to prevent plan administrator's from distorting purely legal remedies for money judgments into various forms of equitable relief, in *Knudson,* the Court below allowed the plan to fabricate a claim for equitable relief, out of a garden variety breach of contract claim. In doing so, the panel ignored the binding precedent this Court established little more than one year ago in *Knudson*. Because all monies distributed to personal injury plaintiffs pass through the client trust fund account of their attorneys, in each case the monies are, identifiable and

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[7] The panel below did so on the basis that Ms. Varco obtained and took possession of money which "in good conscience" belong to the Committee. *See* Appendix B at 9-10. This factual determination, however, ignores that the money was recovered by Ms. Varco for injuries she sustained in a motor vehicle accident. The money rightly belonged to her, notwithstanding her contractual obligations to reimburse the plan for the money it paid for some of her medical treatment resulting from the motor vehicle accident. The Plan cannot claim, and the panel did not find that the Plan paid monies on Ms. Varco's behalf, that it should not have paid, or that Ms. Varco, utilized fraud, duress, or some other culpable behavior to secure the personal injury settlement proceeds. The settlement proceeds are rightly the property of Mrs. Varco, notwithstanding what debt she may owe to the plan. *See*, *Westaff Inc. v. Arce*, 298 F.3d 1164, 1166-1167 (9th Cir. 2002)

segregated, such that, according to the panel's interpretation of *Knudson*, a claim for equitable restitution, and the imposition of a constructive trust would always lie, and thus the federal courts would have federal question subject matter jurisdiction over virtually all personal injury settlements throughout the country. This was not the expressed intent of this Court in *Knudson*. To avoid further confusion, and a flood of litigation relating to distribution of personal injury recoveries, the decision below merits review.

II. The Decision Below Conflicts with Decisions of the Other Federal Circuit Courts of Appeals.

The decision below creates an unquestionable and irreconcilable conflict between the Federal Circuits. For example, in *Westaff Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002), cert denied, 537 U.S. 1111 (2003), the Ninth Circuit confirmed its previous holdings, that an ERISA plan's suit for reimbursement, regardless of the label attached to it, is nothing more than an action for compensatory damages. *Id.*, at 1166. In *Westaff*, the defendant, plan participant, received $15,000.00 to settle a claim against a third party responsible for her injuries. Subsequent to that payment, Westaff, the plan administrator and the defendant disputed the amount due to be reimbursed the plan, and Arce's attorney agreed to put the proceeds of the check into an escrow account pending a determination how much was owed and to whom. Thereafter, Westaff filed suit in Federal Court seeking a declaration that the funds in escrow belonged to it, and an order requiring the funds held in escrow be paid to the plan. In affirming the dismissal of Westaff's suit, and affirming an award of attorneys fees to Arce, the Ninth Circuit specifically recognized this Court's decisions in *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 122

(2002), as the controlling authority on this matter:

> Westaff attempts to characterize this claim as one for equitable relief, labeling it a declaratory judgment action, or action for specific performance. In determining whether an action for equitable relief is properly brought under ERISA we look to the "substance of the remedy sought... rather than the label placed on the remedy. *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1528 n.5 (9th Cir. 1993)(*citing Mertens v. Hewitt Associates*, 508 U.S. 248, 255, 124 L.Ed.2d 161, 113 S.Ct. 2063 (1993)). Westaff is seeking to enforce a contractual obligation for the payment of money, a classic action at law and not an equitable claim. "Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages - monetary relief for all losses their plan sustained as a result of the alleged breach" of the reimbursement provisions. *FMC Med. Plan v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997) (*quoting Mertens,* 508 U.S. at 255). The Supreme Court has recently affirmed our approach in *Great West Life*, in which the court analyzed a similar action to enforce a reimbursement clause by looking past the parties' chosen labels to the substance of relief sought:
>
> > The basis for petitioners' claim is ... that petitioners are contractually entitled to some funds for benefits that they conferred. The kind of restitution that petitioners seek therefore is not equitable - the imposition of a constructive trust or

> equitable lien on particular property - but legal - the imposition of personal liability for the benefits that they conferred upon respondents.
>
> *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 715, 115 L.Ed.2d 635 (2002).
>
> This case differs from our prior cases only in that the money at issue, a legitimate personal injury settlement to which the beneficiary is entitled, has been placed in an escrow account and remains specifically identifiable. The action remains one for money damages. The district court correctly recognized this and dismissed the case for failure to state a claim.

Westaff, 298 F.3d at 1166, 1167.

The decision in *Westaff* is entirely irreconcilable with the decision of the panel below. The facts are identical. Based on identical facts, the Ninth and Seventh Circuits have now come to decisions which are diametrically opposed, and create confusion and uncertainty on this Court's holding and intent in *Great West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204 (2002).

In both cases plaintiff sought to collect part of the proceeds of the plan participant's personal injury recovery as reimbursement pursuant to the terms of the plan. In both cases plaintiff couched its claim in terms of equitable relief in an effort to obtain control of the segregated funds. And in both cases, there was a segregated account against which the plan sought its "equitable" claim. But while the Ninth Circuit

found that the claim was one for money damages, rather than a claim for equitable relief, and thus not properly within the subject matter jurisdiction of the Federal Courts, the panel below, under identical circumstances, came to an opposite conclusion. This split causes confusion, and sets precedent for diverse results under similar circumstances, and warrants review by this court. It is appropriate and necessary for this court to grant certiorari to resolve such clear conflicts between the Circuits. *See*, *Boeing Co. v. United States*, 537 U.S. 437, 445 (2003).

Likewise, other circuits have adhered to this Court's admonition to look past the label attached to a suit filed under § 502(a)(3), and instead determine whether the claimant is seeking to impose personal liability for traditionally legal remedies. *See*, *Gerosa v. Savasta & Co.*, 329 F.3d 317, 321-322 (2nd Cir. 2003); *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 457 (3rd Cir. 2003); *Local 109 Ret. Fund v. First Union National Bank*, 57 Fed. Appx. 139, 140-141 (4th Cir. 2003); *Bauhaus USA Inc. v. Copeland,* 292 F.3d 439, 445 (5th Cir. 2002); *Cmty. Ins. Co. v. Morgan*, 54 Fed. Appx. 828, 831 (6th Cir. 2002), (Specifically holding that a claim for reimbursement pursuant to the contractual language of the plan is nothing more than a claim to impose personal liability for a contractual obligation to pay money.); *Unicare Life & Health Ins. Co. v. Saiter*, 37 Fed. Appx. 171, 173 (6th Cir. 2002). The decision below is an aberration, conflicts with precedent set by this Court, and conflicts with decisions of other circuits, and should be reviewed by this Court to ensure uniform enforcement of federal law.

III. The Decision of the Panel Conflicts with Other Decisions Within the Seventh Circuit.

Not only does the panel's decision conflict with prior decisions of this Court, and other federal circuit courts of appeal, the decision below also creates an intra circuit conflict. In *Primax Recoveries Inc. v. Sevilla*, 324 F.3d 544 (7th Cir. 2003), the Seventh Circuit considered another similar action initiated by Primax Recoveries, an authorized ERISA fiduciary, to recover medical benefits after its employee secured a personal injury settlement. After detailing a tortured procedural history, and recognizing the jurisdictional requirement that the ERISA fiduciary's claim seek equitable, rather than legal relief, the Court in *Sevilla*, evaluated the nature of the relief sought:

> Setting to one side the release, let us consider whether Primax's claim to be entitled to the entirety of the $2,431.78, with no reduction based on the common fund doctrine, is an equitable claim. It is not. Primax wants (remember we're ignoring the release for the moment) $2,431.78 from Sevilla. It is true that Primax is holding on to the check from the third party's insurer, but the check is worthless without the endorsement of Sevilla's lawyer (presumably he can endorse his client's signature as well as his own, though that is another detail we will elide), and while one could imagine construing Primax's suit as a suit for an injunction commanding the lawyer to do that, this would distort the reality of the claim. Primax doesn't want the check as such; it wants the money, and it claims that under the plan Sevilla owes the money to it. That is a claim of breach of

> contract, which is a classic legal claim. Almost any legal claim can be given the form of an equitable claim (that is a claim seeking an order to do or not do something), but such games with form should be discouraged. [*Great-West v.Knudson*, 534 U.S.] at 211 n.1 122 S.Ct. 708; *Wal-Mart Stores, Inc. v. Wells, supra,* 213 F. 3d at 401.

Sevilla, 324 F.3d at 547-548. Here, consistent with *Knudson*, and the decisions of the other federal circuit courts of appeals, most notably, the Ninth Circuit, Justice Posner, in *Sevilla*, made it clear that the Court would not permit semantic gamesmanship to manipulate federal subject matter jurisdiction. Simply put, the Court in *Sevilla*, determined that an ERISA fiduciary's claim for reimbursement under the terms of the plan, no matter how drafted, is a legal claim for breach of contract, and thus not within the federal subject matter jurisdiction granted under 29 U.S.C. § 502(a)(3)(2002). In the decision below, the panel ignored this precedent, the precedent set by this Court, and other Federal Circuits, and had become the first and only panel of the federal circuit courts of appeal to find federal subject matter jurisdiction for an ERISA plan administrator's claim for reimbursement against a plan participant's personal injury recovery. The decision cannot in good conscience be reconciled, and in fact opens the flood gates for the Federal District Courts to become the final arbiters over the distribution of recovery in hundreds of thousands of personal injury claims nationwide. As a result of the panel's refusal to accept the precedent set by this Court, and the decisions of the other circuits, and even within its own circuit, the decision below warrants, in fact demands review.

IV. The Issue Here Presented Is of Substantial Importance.

Whether the Federal Courts should act as the final arbiter of distribution of settlement proceeds of the vast majority of personal injury claims pending in state courts, is a question of substantial importance. As set forth above, this Court, and various other circuits, and in fact other panels of the Seventh Circuit have repeatedly determined that the federal court lacks the required subject matter jurisdiction to preside over an ERISA plan's claim for reimbursement against a plan participant who has made a personal injury recovery. The panel below, however, has ignored this precedent, and carved an exception which emasculates the rule. As a result, not only is the scope and breadth ERISA's subject matter jurisdiction dramatically increased by the decision below, but left intact, the panels' decision will result in the filing of potentially hundreds of thousands of lawsuits, brought by plan administrators, seeking orders to avoid the legal remedies available to them in state courts, and instead, seeking what they call an "equitable remedy" which amounts to nothing more than a money judgment.

The impact is substantial, particularly in light of the current dockets before most Federal District judges, and the ever growing number of unfilled vacancies within the federal judiciary. This Court, and the other circuits to consider this issue, have steadfastly refused to expand the subject matter jurisdiction of ERISA to include such claims for reimbursement. Given the obvious conflict between the Seventh and Ninth Circuits, and the panel's departure from this Court's recent decisions in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 202 (2002), combined with impact of the potential significant increase the number of suits

filed in the federal courts, there is an urgent need for this Court to intervene.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case Nos. 02-3879, 02-1124, & 02-1143
[Decided August 22, 2003]

Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan, Plaintiff-Appellant/Cross-Appellee,	)
v.	)
Clara Varco, Defendant-Appellee/Cross-Appellant.	)

JUDGES: Before Hon. Joel M. Flaum, Chief Judge, Hon. William J. Bauer, Circuit Judge, Hon. Daniel A. Manion, Circuit Judge.

ORDER

On consideration of the petition for rehearing en banc filed by defendant-appellee, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case Nos. 02-3879, 02-1124 & 02-1143
[Decided July 29. 2003]

ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN, Plaintiff-Appellant/Cross-Appellee,	)
v.	)
CLARA VARCO, Defendant-Appellee/Cross-Appellant.	)

JUDGES: Before FLAUM, Chief Judge, and BAUER and MANION, Circuit Judges.

OPINION: MANION, Circuit Judge.

I.

Clara Varco, a Wal-Mart employee, incurred medical expenses due to a car accident, which were paid by Wal-Mart's health and welfare benefit plan. After Varco recovered damages for her injuries in a state court action, the Wal-Mart Plan Committee sought restitution for the medical expenses it

had paid from Varco and her attorney, Laurence Dunford. The district court granted a preliminary injunction in favor of the Committee, preventing Varco and her attorney from disbursing those funds or further adjudicating the matter in state court. Varco and Dunford appealed the preliminary injunction. The district court then granted summary judgment in favor of the Committee, ordering that the medical expenses be remitted to the Committee, less its proportional share of Dunford's attorney's fees pursuant to Illinois' common fund doctrine. The Committee appealed the order diminishing its reimbursement due to the application of the common fund doctrine. The cases were consolidated. We affirm in part and reverse in part.

II.

On September 24, 2000, Clara Varco sustained injuries in an automobile collision in Orland Park, Illinois. At that time she was employed by Wal-Mart Stores, Inc. ("Wal-Mart"), which provides its employees benefits through the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan (the "Plan"). The Plan is a self-funded employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 and administrated by the Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan (the "Committee"). Pursuant to the terms of the Plan,$18,865.72 in medical benefits was immediately paid on behalf of Varco following the accident.

Significantly, for the purposes of appeal, the Plan includes a provision stating that the Committee has a right to "recover or subrogate 100 percent of the benefits paid or to be paid by the Plan on your behalf and/or your dependents to the extent of . . . any judgment, settlement or any payment made or to

be made, relating to the accident, including but not limited to other insurance." The Plan further provides that it "does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the participant."

The procedural intricacies of this case began when Varco retained Laurence J. Dunford to represent her against Kristopher Lapsis, the other driver responsible for her injuries, and to make a claim against All-State Insurance Company, her insurer. She contracted with Dunford to pay him a contingency fee of one-third of any recovery. Varco then filed a tort action in Illinois state court against Lapsis. In October 2001, in contemplation of settlement, Varco sought adjudication of various liens on the lawsuit, including that of the Plan. In response, the Committee asked the state court to postpone adjudication of its lien and filed a notice for removal in federal court. The district court promptly remanded the case back to state court finding no subject matter jurisdiction. *Varco v. Lapsis,* 172 F.Supp.2d 985, 988-92 (N.D. Ill. 2001).[1] Not content with this course of events, the Committee filed a second action in federal court on October 29, 2001, asserting claims under § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3), for "appropriate equitable relief" including an injunction, declaration of rights, specific performance, imposition of a constructive trust and restitution against Varco and Dunford. The Committee also moved to have related matters in state court stayed and Varco and Dunford enjoined from proceeding with further state court litigation.

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[1] In remanding the case, Judge Alesia presciently noted that "there may be federal jurisdiction over the Wal-Mart Committee's independent action if the complaint states a claim under ERISA's civil enforcement provision, § 502(a)(3)." *Lapsis,* 172 F. Supp. 2d at 991 n.7.

While these suits were proceeding, Varco, through her attorney, received settlement proceeds of $100,000. The settlement proceeds were disbursed by Dunford to Varco, himself, and other lienholders. In anticipation of litigation, Varco established a reserve bank account in her name in the amount of $34,034.55 (the initial amount the parties believed to have been spent in medical bills under the Plan) to pay the Committee when the courts resolved the question of what amount was due and owing. Dunford, meanwhile, took his full portion of attorney's fees from the settlement fund ($22,000) when he disbursed the monies, thereby leaving all of the disputed monies in Varco's possession. *Administrative Committee of Wal-Mart Stores, Inc. v. Varco,* 2002 U.S. Dist. LEXIS 18933, No. 01 C 8277, 2002 WL 31189717 *2, n. 5 (N.D. Ill., Oct.02, 2002) ("Varco III"). At the end of December 2001, Dunford and Varco returned to state court and filed a motion to adjudicate Wal-Mart's lien. In response, the Committee filed yet another motion in federal court pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283, the All Writs Act, 28 U.S.C. § 1651, and "the Princess Lida doctrine" to enjoin the state court from adjudicating the liens.

The Committee was successful in both of its motions before the district court. On December 24, 2001, it obtained a temporary restraining order from the district court and a preliminary injunction preventing Varco and Dunford from disbursing the $34,035.55 until "the rights of [the Committee] have been determined by [the district court]." *Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Varco,* 2001 U.S. Dist. LEXIS 25319, No. 1:01-CV-8277, 2001 WL 1772318, *3 (N.D. Ill., Dec. 21,

2001) ("Varco I").[2] On January 14, 2001, the court entered an injunction barring Varco from proceeding with further adjudication of the Committee's lien in state court. *Administrative Committee v. Varco & Dunford,* 2002 U.S. Dist. LEXIS 530, No. 01 C 8277, 2002 WL 47159, *3-4 (N.D. Ill. Jan. 14, 2002) ("Varco II").The court also dismissed all of the Committee's claims for equitable relief with the exception of its "claim for the imposition of constructive trust on particular property in the hands of the defendants and for the pendent state law claims." 2002 U.S. Dist. LEXIS 530, [WL] at *4. After the district court stayed the state court proceedings and enjoined Dunford and Varco from proceeding in state court, the Committee removed for the second time Varco's personal injury action, as all of the liens on the settlement, except for the Committee's, had been paid. The district court found that it properly had jurisdiction to adjudicate the Committee's claim this time, for reimbursement as "equitable relief" under § 502(a)(3)(B),because the Committee was seeking a constructive trust over Varco's reserve account. Varco and Dunford then filed a timely interlocutory appeal of the injunctions arguing, in relevant part, that the district court lacked jurisdiction over the claims because the Committee was seeking legal relief based on the language of the Plan.

While the injunction was pending on appeal, the district court proceeded to address the merits of the case. On October 2, 2002 the district court granted the Committee's motion for summary judgment, holding that the Plan was due

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[2] During the course of the litigation, the parties discovered that Blue Cross/Blue Shield of Illinois, the Plan's third-party administrator, was able to obtain discounts on Varco's medical expenses. As a result, the court granted Varco's motion to amend the preliminary injunction by reducing the amount subject to it to $18,865.72.

reimbursement of the paid medical expenses. *Varco III* 2002 U.S. Dist. LEXIS 18933, [WL] at *4-6. The court also held that, pursuant to Illinois' common fund doctrine, the Committee must bear its proportional share of Dunford's attorney fee. Based on this doctrine, the court determined that the Committee was entitled to restitution of the paid medical expenses,$18,865.72, less its proportional share of Dunford's legal expenses for a total of $12,378.04. In rendering this decision, the district court issued an order noting that by adjudicating the merits of the claim, the preliminary injunctions entered in the case expired by their own terms.[3] As Varco notes, the district court's order on October 29, 2002, effectively mooted the cross-appeals filed by Varco and Dunford insofar as the appeals contested the merits underlying the preliminary injunctions.[4] However, Varco's challenge to

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[3] The first injunction, which required Varco to hold the disputed funds, expired when "the trial court decided the rights of the parties with reference to the funds claimed by the [Committee]." *Varco I* 2001 U.S. Dist. LEXIS 25319, [WL] at *4. The second injunction, which prevented further litigation in state court, expired when all of the remaining actions in the case were removed and then resolved by the district court.

[4] The district court also noted that Wal-Mart's claims against Dunford were voluntarily dismissed pursuant to F.R.C.P. 41(a)(2).The court then dismissed Dunford's counterclaim against Wal-Mart for attorney's fees, and dismissed Dunford as a defendant in the case, as he had received full compensation for his services and all of the disputed funds were in the possession of Varco. Because the issues involving Dunford were mooted by the district court's order disbursing the attorney's fees, he was not included with Varco as an appellant by Wal-Mart. Dunford did not file his own appeal from the court's decision on the merits of the action and thus he has nothing further left at stake in the present appeal. We therefore order Dunford's appeal (02-1143) dismissed as moot.

the district court's jurisdiction to hear the case remains. The Committee then filed a timely appeal from the district court's order on the merits arguing that the common fund doctrine is preempted by ERISA. We consolidated these cases on appeal. Because of the district court's grant of summary judgment, and dismissal of Dunford as a litigant, the only remaining issues that survive on appeal are whether the district court had subject matter jurisdiction over the Committee's claims and, if so, whether the Committee must reimburse Varco for her payments to her attorney pursuant to Illinois common fund doctrine.

III.

On appeal, Varco asserts that the district court erred in finding subject matter jurisdiction to hear the case under 28 U.S.C. § 1331. Varco argues that the district court lacked subject matter jurisdiction because the Committee's claim was for money due and owing under contract, which is essentially a legal remedy, and ERISA creates jurisdiction in federal court only for "other appropriate equitable relief" under § 502(a)(3)(B). Varco argues that the creation of a constructive trust over the disputed funds falls outside of this jurisdictional grant.

A. Subject Matter Jurisdiction

Under 28 U.S.C. § 1331, federal courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." A case arises under the laws of the United States within the meaning of § 1331 only when the claim for relief depends in some way on federal law as stated in a well pleaded complaint, "unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson,* 234 U.S. 74,

75-76, 58 L. Ed. 1218, 34 S. Ct. 724 (1914); *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 401 (7th Cir. 2001). ERISA § 502(a)(3) authorizes a civil action "by a ... fiduciary (A) to enjoin any act or practice which violates ... the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of ... the terms of the plan." 29 U.S.C. § 1132(a)(3). In this case the district court held, relying on the Supreme Court's reasoning *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002), that the Committee was seeking equitable relief as required by ERISA in the form of a constructive trust over the funds held in Varco's reserve account, and, therefore, it had jurisdiction to adjudicate the merits of the Committee's claim. *Varco II,* 2002 U.S. Dist. LEXIS 530, [WL] at *2-3.

In *Great-West Life*, the Court considered a case with facts similar to this case and therefore bears scrutiny. Janette Knudson, a beneficiary of an ERISA-governed employee welfare benefit plan, was injured in a car accident. *Great-West Life,* 534 U.S. at 207. The employee benefit plan included a reimbursement provision that provided the plan with "the right to recover from the [beneficiary] any payment for benefits paid by the Plan that the beneficiary is entitled to recover from a third party." *Id.* In particular, the Great-West plan had "'a first lien upon any recovery, whether by settlement, judgment or otherwise,' that the beneficiary receives from the third party, not to exceed 'the amount of benefits paid [by the Plan] ... [or] the amount received by the [beneficiary] for such medical treatment ...'" *Id.* According to this provision, the Great-West plan covered $411,157.11 of Knudson's medical expenses, of which all except $75,000 was paid by Great-West. *Id.* Great-West then sought to obtain restitution of the medical expenses it had paid on Knudson's

behalf out of her damages recovery. *Id.* at 208. The Court looked at the substance of plaintiff's complaint to determine whether it fell into "those categories of relief that were typically available in equity." *Great-West Life,* 534 U.S. at 210 (quoting *Mertens v. Hewitt Associates,* 508 U.S. 248, 256, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993)). Restitution, the court noted, is "'not an exclusively equitable remedy,'and whether it is legal or equitable in a particular case (and hence whether it is authorized by § 502(a)(3)(B)) remains dependent on the nature of the relief sought." *Id.* at 215 (citing *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994)). The Court contrasted legal restitution, which is not allowed under § 502(a)(3)(B), from equitable restitution holding:

> [A] plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. (citations omitted) A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where "the property[sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's]claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." . . .Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Id. at 213-14.(internal citations omitted)

In *Great-West Life*, the Court then noted that the proceeds of the settlement to which Great-West maintained it was entitled were not in the Knudson's possession, but instead were in a Special Needs Trust. *Id.* at 214. Therefore, under the *Mertens* standard, the Court concluded that Great-West was not seeking equitable relief under § 502(a)(3)(B), because it was not claiming "particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to some funds for benefits that they conferred." *Id.*

Against this backdrop, we proceed to the Committee's claim against Varco. The Committee, as a fiduciary, was seeking to impose a constructive trust on the funds held in Varco's reserve bank account. Unlike the legal action addressed in *Great-West Life*, the funds at issue here are identifiable, have not been dissipated, and are still in the control of a Plan participant due to the fact that Dunford placed them in a reserve account in Varco's name when they were disbursed. Finally those funds, "in good conscience," belong to the Committee. The Plan clearly states that Varco's rights to recover benefits may be subrogated when there is a settlement and that "the Plan has first priority with respect to its right to reduction, reimbursement and subrogation." Under similar facts, we have held that a suit to impose a constructive trust "nestles comfortably" within ERISA's concept of equity. *Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Wells,* 213 F.3d 398, 401 (7th Cir. 2000); *see also* 1 Dan B. Dobbs, *Dobbs on the Law of Remedies: Damages-Equity-Restitution* § 4.3 pp.591 (2d ed. 1993) ("[The asset subject to a constructive trust] may even be a fund of money like a bank account.").

In response, Varco argues that this is essentially a legal claim asserted by the Committee in order to enforce its contract rights under the Plan because "a claim for money due and owing under a contract is 'quintessentially an action at law.'" *Wells,* 213 F.3d at 401 (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n,* 430 U.S. 442, 459, 51 L. Ed. 2d 464, 97 S. Ct. 1261 (1977)). Varco would have a valid argument under traditional principles of equity if an identifiable *res* did not exist to which the Committee could claim a legally recognized right. *See generally* Dobbs § 4.3(2) at 591. Similarly, an argument would exist if the Committee could not trace its property to a specific fund of money. *Id.* at 592. Neither of those situations, however, is presented here. Thus, under *Great-West Life*, the reimbursement action by the Committee in this unique case is equitable because the funds the Committee seeks to recover are identifiable, are in the control of a defendant, and the Committee is rightfully entitled to the monies under the terms of the Plan. Because those elements are met here, the Committee's claim is equitable under § 502(a)(3)(B) of ERISA, and the district court properly exercised federal question subject matter jurisdiction under 28 U.S.C. § 1331.

B. Common Fund Doctrine

We turn next to the question of whether the district court properly applied Illinois' common fund doctrine to the settlement proceeds. Under the common fund doctrine, a lawyer who recovers a sum of money (or "fund") for the benefit of others beyond his client is entitled to reasonable attorney's fees from the fund as a whole. *See Country Mutual Insurance Co. v. Birner,* 293 Ill. App. 3d 452, 688 N.E.2d 859, 861-62, 228 Ill. Dec. 161 (Ill.1997). It is a common law "equitable exception" to the general, or "American" rule, that

each party to litigation bears its own attorney's fees, absent a fee-shifting statute. *See Scholtens v. Schneider,* 173 Ill. 2d 375, 671 N.E.2d 657, 662, 219 Ill. Dec. 490 (Ill. 1996).To be entitled to fees under the common fund doctrine, an attorney must show "(1) that the fund was created as a result of legal services he performed; (2) that the subrogee did not participate in creating the fund; and (3) that the subrogee benefitted out of the fund." *Birner,* 688 N.E.2d at 862. When these conditions are satisfied, fees and expenses incurred in setting up the fund are typically apportioned among those who benefitted from its creation. *Id.* And, finally, "in Illinois, the attorney owns the claim for reimbursement for his services in creating a common fund." *Primax v. Sevilla,* 324 F.3d 544, 549 (7th. Cir. 2002) (*citing Bishop v. Burgard,* 198 Ill. 2d 495, 764 N.E.2d 24, 30-32, 261 Ill. Dec. 733 (Ill. 2002)).

The district court held that even though the Plan specifically provided that the plan participant was responsible for all attorney's fees, the common fund doctrine would still apply, and that in this case the Committee was responsible for one-third of Dunford's fees. The court reasoned that the Plan language would only apply if the Illinois doctrine conflicted with and was preempted by § 514(a) of ERISA (29 U.S.C. § 1144(a)).[5] Varco II, 2002 U.S. Dist. LEXIS 530, [WL] at

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[5] ERISA provides two types of preemption: complete preemption under § 502(e) and conflict preemption under § 514. *See Rice v. Panchal,* 65 F.3d 637, 640 (7th Cir. 1995). Section 502(e), by providing a civil enforcement cause of action, completely preempts any state cause of action seeking the same relief. *Id.* We have held that the common fund doctrine is not preempted under § 502(e). *Speciale v. Seybold,* 147 F.3d 612, 617 (7th Cir. 1998). *See also Primax* 324 F.3d at 549 (stating that in the complete preemption context ". . . we have held that ERISA does *not* preempt common fund claims"). Section 514, in contrast, provides for ordinary

*4. The district court then held, and Varco argues here, that ERISA does not preempt the common fund doctrine pursuant to the law as interpreted by the Illinois Supreme Court. 2002 U.S. Dist. LEXIS 530, [WL] at *5 (citing *Bishop,* 764 N.E.2d at 34). In *Bishop*, the Illinois Supreme Court held that despite an ERISA plan's contractual language requiring 100% reimbursement, the common fund doctrine requires the plan to bear its proportionate share of the participant's attorney's fee.[6] The district court, and Varco, also rely on *Blackburn v. Sundstrand Corp.,* 115 F.3d 493, 496 (7th Cir. 1997). There we held that the Illinois common fund doctrine was not preempted by ERISA to the extent that it allowed ERISA plan beneficiaries to reduce their obligation to repay medical expenses by one third pursuant to a subrogation provision based on beneficiaries' payment of attorney's fees. *Id.*; *accord Primax* at 549; *Wells,* 213 F.3d at 403. The plan at issue in *Blackburn* did not expressly require beneficiaries to pay their own attorney's fees. In this case, the Plan

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conflict preemption dependent on the relationship between the law in question and the language of the plan. Section 514(a) specifically provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a).

[6] The court put a special emphasis on the holding in *Bishop* noting that, "it would be anomalous, however, for this court in this rare case in federal court to adhere to the view that the common fund doctrine does not apply where the 'run of the mine' case of this sort will be decided in the Illinois courts and governed by *Bishop*. If *Bishop* was wrongly decided, only the United States Supreme Court or the legislature can overrule it." *Varco III 2002 U.S. Dist. LEXIS 18933, [WL] at *6.* However, while this case may be the rare case that finds jurisdiction in federal court under this cause of action, that does not mean we should defer to a state court determination of federal law unless that determination is also correct.

specifically provides that it "does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the participant."

We have as yet not had the opportunity to rule, either as a matter of state or federal common law, that the common fund doctrine defeats the terms of an ERISA plan that expressly requires participants to pay their own legal fees. *See Blackburn,* 115 F.3d at 496. In *Blackburn*, we found that although the common fund doctrine applied where the plan did not specifically require the participant to bear her own attorney's fees, we commented that "a plan might have a better argument if its governing documents expressly required participants to pay their own legal fees . . . and to remit the gross rather than the net proceeds from litigation." We cautioned that such a provision would likely give the injured person "every reason to disclaim any demand for medical expenses in tort suits, throwing on plans the burden and expense of collection," if not someone else. *Id.* at 496. Furthermore, we have stated that "because ERISA supersedes any and all state laws relating to covered plans, . . . [the Illinois common fund] doctrine is not available to [the beneficiary] [where] the terms of the plan require reimbursement of the entire amount without the deduction of any attorney's fees." *Land v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Health and Welfare Fund,* 25 F.3d 509, 510 (7th Cir.1994). This dicta in *Land* did not settle the matter as recognized in *Blackburn,* wherein we specifically noted that "the status of the state's common fund doctrine is a recurring question that should be clarified. . . ." *Blackburn,* 115 F.3d at 495. This case presents the opportunity to answer that question in determining whether the Illinois common fund doctrine relates to and conflicts with the terms of the Plan.

"[A] state law relates to an ERISA plan 'if it has a connection with or reference to such a plan.'" *Egelhoff v. Egelhoff,* 532 U.S. 141, 147, 149 L. Ed. 2d 264, 121 S. Ct. 1322 (quoting *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 97, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983)). The requisite connection exists under *514(a)* if a law mandates employee benefit structures or their administration or provides alternative enforcement mechanisms to ERISA. *New York Conf. of Blue Cross v. Travelers Ins. Co.,* 514 U.S. 645, 658, 131 L. Ed. 2d 695, 115 S. Ct. 1671 (1995). In this analysis, a court "looks both to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive as well as to the nature of the effect of the state law on ERISA plans." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.,* 519 U.S. 316, 325, 136 L. Ed. 2d 791, 117 S. Ct. 832 (1997) (internal citations and punctuation omitted). In *Egelhoff,* for example, the Court found conflict preemption and noted that the "the statute at issue here directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents." *Egelhoff,* 532 U.S. at 150. Justice Scalia, in his concurrence, notes that while he remained unsure "as to what else triggers the 'relate to' provision", the "pre-emptive provision of the *Employee Retirement Income Security Act of 1974* (ERISA) is assuredly triggered by a state law that contradicts ERISA." *Id.* at 152 (J. Scalia, concurring).

In this case, much like *Egelhoff,* state law contradicts the terms of the Plan and therefore contravenes ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents. *See also Melton v. Melton,* 324 F.3d 941, 945 (7th Cir. 2003). Varco seeks to invoke a state law doctrine to her advantage in determining her recovery as a beneficiary under an ERISA-regulated

employee benefits plan. If the Illinois common fund doctrine were applied, the Committee would receive less than total reimbursement of Varco's medical benefits from her settlement through the deduction of her attorney's fees in contravention of the clear mandate of the Plan. Conflict preemption, therefore, is appropriate in this case where "Congress has made its preemption intention clear in the language of the statute, the Supreme Court has affirmed that intent, and we have applied the rule in similar cases." *Melton,* 324 F.3d at 945 (*citing* 29 U.S.C. § 1144(a) and *Egelhoff,* 532 U.S. at 151). Because the Plan controls in this case, the Committee is due the full amount of the medical expenses paid on Varco's behalf, or $18,865.72.

Furthermore, it is not readily apparent that Varco has standing to raise the claim for attorney's fees under the Illinois common fund doctrine. In *Bishop*, the Illinois Supreme Court noted that the right of the common fund doctrine is a "quasi-contractual right to payment of fees for services rendered [and] belongs to the attorney who rendered the services and does not affect the contractual relationship between the plan participant and the plan." *Bishop* at 31 (*citing Scholtens v. Schneider,* 173 Ill. 2d 375, 671 N.E.2d 657, 219 Ill. Dec. 490 (1996)); *Primax,* 324 F.3d at 547. Common fund claims are therefore considered "wholly independent of a benefit plan under Illinois law, and [are] to be brought by a third party, the attorney who represented the participant, to enforce the attorney's quasi-contractual right to payment for services rendered in recovering [for the plan's benefit]." *Hillenbrand v. Meyer Medical Group, S.C.,* 308 Ill. App. 3d 381, 720 N.E.2d 287, 294, 241 Ill. Dec. 832 (1999).For example, in *Bishop*, although the named parties to the action were the plan and the plan participant, the court viewed "the motion for adjudication . . . [as] an independent action by the attorney, which is unrelated to the benefit plan

and does not alter the contractual relationship of the parties thereto." *Id.* at 34. Because of this characterization, the court determined that the parties properly had standing to maintain the cause of action and ruled that neither conflict preemption, under § 514(a), nor complete preemption, under § 502(e), applied to the claim due to the lack of a relationship between the plan and the claimant. Id.

Pursuant to this characterization, Varco would only have standing to bring this claim under Illinois law if this case involves a dispute which can be fairly characterized as an independent action by the attorney to enforce his right to payment for services rendered. As we previously noted, Varco's attorney Dunford has been dismissed from this action and all of the disputed funds remain in Varco's sole possession in a reserve account in her name. The Committee in this case is therefore seeking to assert its rights under the Plan, through an equitable action, to monies held in their entirety by Varco. Dunford has already been completely compensated, and perhaps over-compensated, with other funds derived from the settlement. What Varco is really seeking is reimbursement from the Committee for the fees that she has already paid to Dunford in anticipation of the application of the Illinois common fund doctrine. However, as Illinois courts have held, the common fund doctrine operates independently of a plan document. The relationship between Varco and the Plan is controlled completely by the terms of the Plan, *see Egelhoff,* 532 U.S. at 147-48, and those terms dictate that the Plan is not responsible for attorney's fees. If Dunford had not compensated himself fully, and, as a result, still had a stake in the action based on the outcome of this case, then the district court could have properly categorized the action as one by an attorney to enforce his rights and therefore appropriately brought by Varco under Illinois state law. But because Dunford has no stake in the

outcome of this case, this action by Varco is not for appropriate equitable relief pursuant to the Illinois common fund doctrine.

Our conclusion that the Illinois common fund doctrine conflicts with, and therefore is preempted by, the terms of the Plan in this case does not completely foreclose the possibility of Varco asserting a claim. As Varco argues, the federal common fund doctrine, which is similar to, but not identical in application to the Illinois doctrine, has existed independently in the federal system since 1882. *See Boeing v. Van Gemert, et al.*, 444 U.S. 472, 478, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980). Although primarily used only in situations involving class action law suits, federal courts have interpreted the doctrine to apply in single-party ERISA disputes despite the absence in the suit of the affected attorney. *See McIntosh v. Pacific Holding Co.*, 120 F.3d 911, 912 (8th Cir. 1997); *Waller v. Hormel Foods Corp.*, 120 F.3d 138, 141 (8th Cir. 1996). *But see Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 278-79 (1st Cir. 2000).

Courts that have applied the federal common fund doctrine have done so pursuant to the rule that courts may fashion federal common law when "necessary to effectuate the purposes of ERISA." *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4th Cir. 1992) (citations omitted). However, in reviewing ERISA-related disputes, "resort to federal common law generally is inappropriate when its application would conflict with the statutory provisions of ERISA, discourage employers from implementing plans governed by ERISA, or threaten to override the explicit terms of an established ERISA benefit plan." *Id.* (citations omitted).

As we have often recognized, one of ERISA's primary purposes is to ensure the integrity of written plans. *Duggan v.*

Hobbs, 99 F.3d 307, 309-10 (9th Cir. 1996); *see also Van Orman v. American Ins. Co.,* 680 F.2d 301, 312 (3d Cir.1982) ("The Supreme Court has emphasized the primacy of plan provisions absent a conflict with the statutory policies of ERISA."); *Pohl v. National Benefits Consultants, Inc.,* 956 F.2d 126, 128 (7th Cir. 1992). Thus, we have held that to ensure the integrity of pension and welfare plans courts should confine the benefits to the terms of the plans as written. *Pohl,* 956 F.2d at 128. Therefore, it is inappropriate to fashion a common law rule that would override the express terms of a private plan unless the overridden plan provision conflicts with statutory provisions or other policies underlying ERISA. *Id.*

In this case, applying federal common law to override the Plan's reimbursement provision would contravene, rather than effectuate, the underlying purposes of ERISA because the express terms of the Plan provide for the appropriate distribution of attorney's fees. *See Coleman v. Nationwide Life Ins. Co.,* 969 F.2d 54, 58 (7th Cir. 1992); *Ryan by Capria-Ryan v. Federal Express Corp.,* 78 F.3d 123, 127-28 (3d Cir. 1996) (holding that the federal common fund doctrine may not be applied in contravention of a plan's terms).

Those cases which have applied the federal common fund doctrine in the favor of individual ERISA participants have done so, correctly, only in the absence of controlling plan language. *See McIntosh* at 912; *Waller,* at 141. Accordingly, we conclude that the Plan in this case controls the relationship between Varco and the Committee, and because it does not authorize the payment of her attorney's fees, we do not possess the authority to rewrite the Plan in her benefit.

Finally, Varco argues that by allowing the Committee to recoup its medical payments even though it did not pay for the

legal prosecution of the action, we are essentially awarding them unjust enrichment. However, the unambiguous language of the Plan obligates her to repay the benefits paid in full without a pro rata deduction for her legal expenses, and thus any so-called enrichment is not unjust. *See Ryan,* 78 F.3d at 127 ("Enrichment is not 'unjust' where it is allowed by the express terms of the . . . plan.") (quoting *Cummings by Techmeier v. Briggs & Stratton Retirement Plan,* 797 F.2d 383, 390 (7th Cir. 1986)). This type of plan provision, involving the relinquishment by a plan participant of certain legal rights, has previously been upheld in *Cutting v. Jerome Foods, Inc.,* 993 F.2d 1293, 1297-98 (7th Cir. 1993). In *Cutting*, we explained the trade-off whereby most covered persons-- if given an option-- would readily give up a "common fund-type" reduction in exchange for having their medical expenses paid up-front in third-party liability situations instead of refusing the benefits (and therefore not having to reimburse the plan) and paying their medical expenses out of their settlement. "Assignment, by shifting the insured's tort rights to the insurance company, reduces the price of insurance and thus enables the insured to obtain more coverage, in effect trading an uncertain bundle of tort rights for a larger certain right, which is just the sort of trade that people seek through insurance." *Id.* at 1298. In this case, plan participants have traded the possibility of having the Plan participate in attorney's fees for the guarantee that medical bills will be paid immediately.

IV.

In conclusion, the district court correctly accepted subject matter jurisdiction under 502(a)(3)(B) because the Committee was seeking an equitable remedy to enforce the terms of the Plan. However, the court improperly held that the Illinois common fund doctrine applied in reducing the amount owed

to Committee from $18,865.72 to $12,378.04. The federal common fund doctrine is inapplicable in this case as its application would contravene the plain language of the Plan. This case is AFFIRMED in part, REVERSED in part, and REMANDED to the district court with instructions, to proceed in the manner provided.

APPENDIX C

United States District Court
Northern District of Illinois
Eastern Division

Case Number 01-C-8277
[Entered Oct. 29, 2002]

Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan	)
v.	)
Clara Varco, et al.	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff on Count II of its complaint, Wal-Mart Stores, Inc. Associates' Health and Welfare Plan. Within 7 days of entry of this order, defendant Clara Varco is directed to make restitution to plaintiff in the amount of

$12,378.04. The preliminary injunctions entered in this case on December 21, 2001 and on January 10, 2002, having expired by their terms, and all other claims presented by the complaint and counterclaims having been previously dismissed, this case is terminated.

Michael W. Dobbins, Clerk of Court

Date: 10/29/2002

Michael Dooley, Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 01-C-8277
[Decided Oct. 2, 2002]

ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN,
Plaintiff and Counter defendant,

vs.

CLARA VARCO,
Defendant,

and

LAURENCE DUNFORD,
Defendant and Counter plaintiff.

JUDGE: JOAN HUMPHREY LEFKOW, United States District Judge.

Plaintiff and counter-defendant, Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan ("Wal-Mart"), is a fiduciary and administrator of an employee welfare benefit plan (the "Plan") under the

Employee Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. Defendant, Clara Varco ("Varco"), is a participant in the Plan and a party in possession of monies attributable to medical expenses advanced by Wal-Mart under the Plan which were derived from a third party recovery in a state court action. In this case, Wal-Mart seeks restitution in an amount equal to the reimbursement to which it is entitled under the Plan for payment of Varco's medical expenses. Defendant and counter-plaintiff, Laurence J. Dunford ("Dunford"), an attorney who was retained by Varco, seeks in his counterclaim a judgment against Wal-Mart for a portion of his professional fee out of the same monies in Varco's possession from which Wal-Mart seeks reimbursement. For the reasons set forth herein, the court grants Wal-Mart's motion but finds that under the common fund doctrine Wal-Mart must pay its proportional share of Dunford's attorney's fee. Thus, judgment in favor of Wal-Mart shall be reduced from the amount requested.

SUMMARY JUDGMENT STANDARDS

Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether any genuine fact exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. Fed R. Civ. P. 56(c) Advisory Committee's notes. The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In response, the non-moving party cannot rest on bare pleadings alone but must use the evidentiary tools listed above to designate specific material facts showing that there is a

genuine issue for trial. *Id.* at 324; *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 598 (7th Cir. 2000). A material fact must be outcome determinative under the governing law. *Insolia*, 216 F.3d at 598-99. Although a bare contention that an issue of fact exists is insufficient to create a factual dispute, *Bellaver v. Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000), the court must construe all facts in a light most favorable to the non-moving party as well as view all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

FACTS AND PROCEDURAL HISTORY

Although the facts and the procedural history are well-known among the court and the parties, the court reiterates from its earlier memorandum opinion and order as follows:

> Varco at all relevant times was a participant in a health and welfare plan (the "Plan") provided by her employer and administered by Wal-Mart.[1] The Plan provides that it has a right to " recover or subrogate 100 percent of the benefits paid or to be paid by the Plan on your behalf and/or your dependents to the extent of . . . any judgment, settlement or any payment made or to be made, relating to the accident, including but not limited to other insurance." The Plan further provides that it " does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the

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[1] Further background may be found in *Varco v. Lapsis*, 172 F. Supp. 2d 985, 987-88 (N.D. Ill. 2001).

participant."[2] After an automobile accident with Kristopher Lapsis ("Lapsis") during September, 2000, Wal-Mart paid medical benefits on behalf of Varco in the amount of $34,034.55. Varco filed a tort action in the Circuit Court of Cook County, Illinois, against Lapsis, and in October, 2001, in contemplation of settlement, Varco by and through her counsel, Dunford, sought adjudication of various liens, including that of Wal-Mart. Wal-Mart asked the state court to postpone adjudication of its lien and on October 4, 2001, removed the state court case to this court. The Honorable James A. Alesia, relying on *Blackburn v. Sundstrand Corp.,* 115 F.3d 493 (7th Cir. 1997), and *Speciale v. Seybold,* 147 F.3d 612 (7th Cir. 1998), held the case improperly removed and remanded it to the state court. *Varco v. Lapsis,* 172 F. Supp. 2d 985, 986-87 (N.D. Ill. 2001). On October 29, Wal-Mart filed this action. In early December, 2001, Dunford disbursed the settlement funds, while still subject to plaintiff's lien, to Varco and himself. Shortly thereafter, plaintiff sought emergency relief in this court to restrain defendants from further disposition of the funds until plaintiff's claim could be resolved. On December 14 and 21, 2001, this court granted plaintiff's motions for a temporary restraining order ("TRO") and preliminary injunction, respectively, because this court found that it had subject matter jurisdiction under *Administrative*

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[2] Varco concedes that she received the Plan's Associates Benefits Book, which includes these provisions. (Varco Aff. P2.) However, Varco attests that " she did not receive the plan and trust documents which created the duties and obligations of the parties[.]" (*Id.* P3.) Neither Varco nor her counsel attests that they made a discovery request for the documents.

Committee v. Gauf, 188 F.3d 767, 770 (7th Cir. 1999), and that plaintiff had a likelihood of success on the merits of a claim to impose a constructive trust[3] where plaintiff's counsel had disbursed the funds without an adjudication by *any* court of Wal-Mart's claim to share in the fund. On or about December 29, Dunford and Varco returned to state court with a motion to adjudicate Wal-Mart's lien. In response, plaintiff filed . . . an emergency motion pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283, the All Writs Act, 28 U.S.C. § 1651, and "the *Princess Lida* doctrine" [4] to enjoin the state court from adjudicating plaintiff's right to reimbursement subject to the lien.

On January 3, 2002, this court requested that Dunford ask the state court to continue the motion to adjudicate the lien to permit this court to consider plaintiff's emergency motion. On January 4, 2002, the state court continued the matter to January 11, noting its own jurisdiction over the remanded *Lapsis* case and specifically over Varco's petition to adjudicate the right of Wal-Mart to reimbursement. On January 10, 2002, this court entered an order to stay the state court proceedings and to enjoin defendants from further proceeding in state court.

Administrative Committee v. Varco & Dunford, 2002 U.S. Dist. LEXIS 530, 2002 WL 47159, at *1-3 (N.D. Ill. Jan. 14, 2002).

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[3] The court relied on *Wal-Mart Stores, Inc. Assocs. Health and Welfare Plan v. Wells,* 213 F.3d 398, 403-04 (7th Cir. 2000).

[4] *Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 456, 466-67, 83 L. Ed. 285, 59 S. Ct. 275 (1939).

After this court stayed the state court proceedings and enjoined Dunford and Varco from proceeding in state court, on January 24, 2002, Wal-Mart removed for the second time Varco's personal injury action, *Varco* v. *Lapsis*, No. 02 C 0566, as the only remaining issue in that case was Varco's petition to adjudicate the lien of Wal-Mart, inasmuch as the state court, on Varco's motion, had dismissed all claims against all defendants, and no other liens were outstanding. On February 14, 2002, the removed case was reassigned to this court on grounds of relatedness. It is further noted that although the court was originally informed that the disputed monies could be traced to Dunford and Varco, Dunford has stated in open court that Varco holds all the disputed funds in a bank account. Moreover, because Blue Cross Blue Shield of Illinois, the Plan's third party administrator, was able to obtain discounts on Varco's medical expenses, the court on March 21, 2002, granted Varco's motion to amend the preliminary injunction by reducing the amount subject to it to $ 18,865.72.[5]

Wal-Mart filed a motion to dismiss the counterclaim, arguing that ERISA preempts the common fund doctrine where the Plan's terms state that the attorney's fees are the responsibility of the participant and not the Plan and, alternatively, if ERISA does not preempt the common fund doctrine, then it has no application because Varco's recovery enabled her to pay Dunford and reimburse the Plan. Wal-

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[5] When Dunford disbursed the settlement funds, Wal-Mart amended its original complaint to include Dunford as a defendant in its ERISA claim and also alleged state law claims of tortious inference with contractual relations and conversion. Dunford filed a counterclaim for attorney's fees. Subsequently, Dunford filed a motion for summary judgment on Wal-Mart's state law claims and his counterclaim.

Mart raised the same arguments in its response to Dunford's motion for summary judgment on his counterclaim. Because Dunford has already indicated that he received his full portion of attorney's fees from the settlement fund when he disbursed the monies and the disputed monies are in Varco's possession, Dunford has no claim against Wal-Mart.

Moreover, in response to Dunford's motion for summary judgment on the state law claims, Wal-Mart stated in its response brief that it would not object to the dismissal of its state law claims against Dunford now that the disputed monies are held by Varco. As such, the court construes Wal-Mart's brief in response as a motion for voluntary dismissal under Rule 41(a)(2), Fed. R. Civ. P., and dismisses the state law claims against Dunford.

As noted above, the disputed monies are in Varco's possession and not Dunford's and, thus, Wal-Mart no longer has an action against Dunford. As such, the court will dismiss Dunford as a defendant subject to Federal Rule of Civil Procedure 21 ("parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just"). Because Dunford has been paid, his counterclaim against Wal-Mart will be dismissed. As a consequence, Wal-Mart's motion to dismiss the counterclaim and Dunford's motion for summary judgment on his counterclaim are moot.

DISCUSSION

Wal-Mart seeks to enforce the reimbursement terms of the Plan pursuant to section 502(a)(3) of ERISA, 29 U.S.C.

§ 1132(a)(3).[6] (Pl. Mem. at 3.)[7] In response, Varco raises several grounds for why summary judgment should be denied, namely, (1) the court lacks jurisdiction to hear the instant case; (2) the Plan's provisions do not impose a contractual duty on Varco; (3) the Plan's provisions do not bar recovery of attorney's fees from the Plan; and (4) federal courts apply the common fund doctrine to ERISA actions.

A. The court's jurisdiction to hear ERISA claims

Varco resurrects her argument from her motion to dismiss that the court lacks subject matter jurisdiction to hear the instant case. Specifically, Varco asserts that the court's imposition of the constructive trust subject to its preliminary injunction is not "other appropriate equitable relief" under §

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[6] The civil enforcement section of ERISA provides, in relevant part,

> (a) Persons empowered to bring a civil action
> A civil action may be brought-
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter of the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. § 1132(a)(3).

[7] Wal-Mart also seeks the same amount according to an equitable lien and restitution. (Pl. Mem. at 3.) However, on January 14, 2002, the court dismissed all of Wal-Mart's claims for equitable relief with the exception of its " claim for the imposition of constructive trust on particular property in the hands of the defendants and for the pendent state law claims." *Administrative Committee,* 2002 U.S. Dist. LEXIS 530, 2002 WL 47159, at *4.

502(a)(3)(B) of ERISA, 29 U.S.C. § 1132(a)(3)(B), but is rather merely a legal claim. Varco relies on *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002) and *Bauhaus USA, Inc. v. Copeland,* 292 F.3d 439 (5th Cir. 2002). The Court in *Great-West Life* held that section 502(a)(3), which authorizes a fiduciary to bring an action for appropriate equitable relief, did not authorize a suit by an ERISA plan against a beneficiary for reimbursement where the settlement funds (derived from the personal injury suit) had already been distributed to a special needs trust for the beneficiary's care and to the beneficiary's attorney in the state court action and lien holders (including a small portion to the ERISA plan), on the basis that the relief sought was legal relief. 534 U.S. at 204, 122 S. Ct. at 714-17. This court considered *Great-West Life* in its January 14, 2002 opinion and found it distinguishable. It will not revisit it here.

Bauhaus was decided May 21, 2002 and, thus, not previously considered by this court. In *Bauhaus*, the court affirmed the lower court's dismissal of an ERISA plan administrator's declaratory judgment action to enforce the terms of an employee benefit plan in order to obtain a portion of the participant's settlement funds in a tort suit. Treating the case as "indistinguishable in principle" from *Great-West Life*, the court affirmed the district court's dismissal. Significantly for our purposes here, the court compared the *Great West Life* facts, where the funds were in possession of a private special needs trust, to the *Bauhaus* facts, where the funds were in the registry of the court, and reasoned that the claim was still for legal rather than equitable relief because the defendants, participants and beneficiaries of the ERISA plan, "like the Knudsons in *Great-West*, are not in possession of the disputed funds, a fact that Justice Scalia found extremely important in *Great-West*." 292 F.3d at 445.

In this court's prior decision on Varco's motion to dismiss, it stated that the facts in the instant case were distinguishable from *Great-West Life, Administrative Committee,* 2002 U.S. Dist. LEXIS 530, 2002 WL 47159, at *3. Specifically, this court determined that it had subject matter jurisdiction because Wal-Mart claimed it was rightfully entitled to a portion of the disbursed settlement funds and had sued Varco (and Dunford at the time), who were in possession of the funds, for restitution. Thus, the court assumed control of the monies by imposing a constructive trust over the funds. *Id.* For the same reasons, the instant case is also distinguishable from *Bauhaus. See Great-West Life & Annuity Ins. Co. v. Brown,* 192 F. Supp. 2d 1376, 1381 (N.D. Ga. 2002) ("Here, Defendant has placed the amount in controversy, which came directly from the settlement, in a non-interest bearing trust account. Therefore, the funds are identified and clearly traceable to the award from third parties. Accordingly, Plaintiff may seek restitution in equity"); *IBEW-NECA Southwestern Health and Benefit Fund v. Douthitt,* 211 F. Supp. 2d 812, 816 (N.D. Tx. 2002) (distinguishing *Great-West Life* and *Bauhaus* because the plaintiffs "do not seek to impose personal liability on Defendant. Instead, Plaintiffs seek a constructive trust over particular funds, separate and apart from Defendant's personal resources, and only to the extent of the benefits it provided"). Varco does not address this distinction that the monies Wal-Mart seeks from her are within her sole possession. For these reasons, the court adheres to its view that it has subject matter jurisdiction.[8]

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[8] Varco also makes the argument that Wal-Mart does not have a superior moral or equitable claim to the funds. This seems to be an argument that pertains to who is the "true owner" of the *res* once a constructive trust has been imposed. As it does not seem pertinent to jurisdiction, the court disregards this portion of Varco's

B. Varco's contractual duty under the Plan

Varco next argues that the provisions set forth in the Associates Benefits Book do not impose a contractual duty on her. Varco points to a provision in the Associates Benefits Book, which provides:

> This booklet explains the principal provisions of each of Wal-Mart's benefit programs in simple language. However, if there is a disagreement between this booklet and the legal documents (plan text, trust agreements or insurance contract), which define the benefits of these plans, the legal documents will always govern.

(Varco Aff. Ex. A.) Varco asserts that because the Associates Benefits Book includes the statement "the legal documents will always govern" and she has not been provided these legal documents, a genuine issue of material fact exists as to her contractual duty under the Plan. In response, Wal-Mart provides a "Wrap Document," which incorporates the Associates Benefits Book. Wal-Mart contends that the Wrap Document and the Associates Benefits Book constitute "the Plan."

Varco's argument is frivolous on its face, lacking in reason or authority. *See Health Cost Controls of Illinois v. Washington,* 187 F.3d 703, 710 (7th Cir. 1999) ("When . . . the plan and the summary plan description conflict, the former governs, being more complete-the original, as it were, which the summary plan description excerpts and translates into language that may be imprecise because it is designed to

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argument.

be intelligible to lay persons-unless the plan participant or beneficiary has reasonably relied on the summary plan description to his detriment"). Moreover, Varco points to no discovery request for the documents she does not have or any disagreement between the Associates Benefits Book and the full Plan documents concerning Varco's contractual duty under the Plan and Wal-Mart's right to reimbursement. Therefore, no genuine issue of material fact exists that the Plan imposes a duty on Varco to reimburse Wal-Mart for the medical payments advanced on her behalf.

C. The Plan's provisions on attorney's fees

Varco further contends that the language relied on by Wal-Mart for full reimbursement does not bar recovery of her attorney's fee from the Plan. Essentially, she recasts the issue as one of who will pay Wal-Mart's share of Dunford's fee and argues that the Plan does not address it. Specifically, Varco points to the various provisions in the Plan, which state:

> The Plan has the right to . . . recover or subrogate 100 percent of the benefits paid or to be paid by the Plan on your behalf . . . to the extent of any of the following payments: . . . . Attorneys fees
>
> * * *
>
> **NOTES:**
> The Plan does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the participant.

(Varco Aff. Ex. A.) Varco reasons that if the Plan intended that she should pay Wal-Mart's share of her attorney's fee, then those terms should have been included in the Associates

Benefits Book.[9] Again, this argument is specious. It is merely an attempt to address the applicability of the common fund doctrine, discussed below, and will be treated as such.

D. The applicability of the common fund doctrine

The Illinois common fund doctrine provides that where an attorney's work generates a fund, the attorney is entitled to be paid from that fund and the beneficiaries of the fund are only entitled to the proceeds net of their proportionate share of the legal expense. *Blackburn,* 115 F.3d at 494. It is a common law "equitable exception" to the general, or "American" rule, that each party to litigation bears its own attorney fees, absent a fee-shifting statute, *Scholtens v. Schneider,* 173 Ill. 2d 375, 384, 671 N.E.2d 657, 662, 219 Ill. Dec. 490 (1996), and is based on the concept of unjust enrichment. 173 Ill. 2d at 385, 671 N.E.2d at 663 ("Unless the costs of litigation are spread to the beneficiaries of the fund, they will be unjustly enriched by the attorney's efforts"). *Accord, Boeing Co. v.*

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[9] Varco relies on language in the recent decision of the Illinois Supreme Court in *Bishop v. Burgard,* 198 Ill. 2d 495, 499, 764 N.E.2d 24, 28, 261 Ill. Dec. 733 (2002), where the court, in describing the terms of the ERISA plan, pointed out that the " plan provisions do not expressly repudiate the common fund doctrine, nor do they specifically state that the participant will be obligated to pay *the plan's* attorney fees." (emphasis in original).

Varco also points to the section "Cooperation Required," which has a provision that requires the participant to cooperate in the Plan's recovery of the payments made by the Plan. Based on this provision, she makes the policy argument that the Plan may force a participant to hire an attorney and be forced to pay attorney's fees that would benefit only the Plan. Although this situation may occur, these are not the facts before this court.

Van Gemert, 444 U.S. 472 at 478, 62 L. Ed. 2d 676, 100 S. Ct. 745 ("The common fund doctrine reflects the traditional practice in courts of equity . . . and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees").

The reimbursement provision of the Plan requires 100% reimbursement and proclaims that the Plan is not responsible for paying the participant's attorney's fee when the participant recovers medical expenses. Despite this provision, Varco contends that under the common fund doctrine the Plan is obligated to pay its share of her attorney's fee. Varco relies on favorable dicta in *Administrative Committee v. Wells,* 213 F.3d 398, 403 (7th Cir. 2000), as well as the recent pronouncement of the Illinois Supreme Court in *Bishop v. Burgard,* 198 Ill. 2d 495, 510, 764 N.E.2d 24, 34, 261 Ill. Dec. 733 (2002), which holds that despite an ERISA plan's contractual language requiring 100% reimbursement, the common fund doctrine requires the Plan to bear its proportionate share of the participant's attorney's fee.[10]

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[10] *Bishop* held on facts very similar to those presented here that ERISA does not preempt Illinois' common fund doctrine and that the doctrine applies even where the explicit terms of the plan require plaintiff to bear her attorney's fee. The court reasoned, quoting from its earlier decision in *Scholtens,* 173 Ill. 2d at 389-90, 671 N.E.2d at 664-65,

> "In effect, the attorney who performed legal services that ultimately led to the recovery of the plan's subrogation lien instituted a separate and distinct action against the Trustees for unpaid fees. The act, in substance if not in form, is wholly independent of and unrelated to the underlying benefit plan."

Bishop, 198 Ill. 2d at 504, 764 N.E.2d at 31.

Wal-Mart dismisses *Bishop* as having already had its holding rejected by federal courts,[11] arguing that it is inconsistent with *Egelhoff v. Egelhoff,* 532 U.S. 141, 152, 149 L. Ed. 2d 264, 121 S. Ct. 1322 (2001) (ERISA preempts state law providing that designation of spouse as beneficiary of a non-probate asset is revoked automatically on divorce), *Health Cost Controls of Illinois,* 187 F.3d at 710 (reimbursement provisions of an ERISA plan document entitled the assignee of the beneficiary to reimbursement out of third party recovery), and *Harris Trust and Savings Bank v. Provident Life and Accident Ins. Co.,* 57 F.3d 608, 615-16 (7th Cir. 1995) (ERISA plan entitled to reimbursement of expenses paid to employee out of third party recovery). Wal-Mart, further, accurately points out that the Seventh Circuit has never ruled, either as a matter of state or federal common law, that the common fund doctrine defeats the terms of an ERISA plan that expressly require participants to pay their own legal fees. *See Blackburn,* 115 F.3d at 496 (Although the common fund doctrine applied where the Plan did not specifically require participant to bear her own attorney's fee, the court commented, "A plan might have a better argument

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[11] *See, e.g., Great-West Life and Annuity Ins. Co. v. Moore,* 133 F. Supp. 2d 677, 680 (N.D. Ill. 2001) (concluding the bank holding the funds in dispute should be ordered to turn over the funds to the plan fiduciary in accordance with the plan's terms and not with the common fund doctrine); *Fairfield Mfg. Co. v. Hartman,* 132 F. Supp.2d 1142, 1146 (N.D. Ill. 2001) (holding common fund doctrine inapplicable where plan provision expressly disclaimed obligation to pay participant's attorney's fees); *McCotter v. Longo,* 1997 U.S. Dist. LEXIS 15357, 1997 WL 630188, at (N.D. Ill. Sept. 30, 1997) ("Unlike the plan in *Blackburn*, the Plan here expressly provides that its right to reimbursement will not be reduced by the covered person's own negligence or attorney's fees and costs . . . *Blackburn's* holding is inapplicable here. . . .").

if its governing documents expressly required participants to pay their own legal fees . . . and to remit the gross rather than the net proceeds from litigation"); *Wells,* 213 F.3d at 403 ("We need not consider whether [Indiana] 'common fund' law is applicable . . . ."). Further supporting Wal-Mart, the Seventh Circuit has stated, in *dicta* but plainly, that " because ERISA supersedes any and all state laws relating to covered plans, . . . [the Illinois common fund] doctrine is not available to [the beneficiary] [where] the terms of the plan require reimbursement of the entire amount without the deduction of any attorney's fees." *Land v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Health and Welfare Fund,* 25 F.3d 509, 510 (7th Cir. 1994).

However, as the Seventh Circuit three years after *Land* stated in *Blackburn*, "The status of the state's common-fund doctrine is a recurring question that should be clarified . . . ." In holding that the federal court lacked jurisdiction over a claim that the common fund doctrine applied to a third party recovery or over the Plan's preemption defense, the court in *Blackburn* specifically ruled: "The Illinois common-fund doctrine is not preempted . . . . *Scholtens v. Schneider,* 173 Ill. 2d 375, 219 Ill. Dec. 490, 671 N.E.2d 657 (1996), holds that § 514(a) does not preempt the common-fund doctrine. We agree with *Scholtens*." 115 F.3d at 495.

If the law is as *Blackburn* says and as *Wells* indicates, the common fund doctrine is not preempted and state courts have jurisdiction to rule on the federal defense (if it exists where a fiduciary is concerned).[12] Until *Bishop* was decided, an

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[12] *Great West Life* ruled that the fiduciary had no claim under § 502(a)(3). It reserved the possibility that a remedy might otherwise be available, stating, "We express no opinion as to

ERISA plan that specifically required the participant to bear her attorney's fee could be distinguished from *Scholtens* and *Wells*, as the federal courts have consistently done. It would be anomalous, however, for this court in this rare case in federal court[13] to adhere to the view that the common fund doctrine does not apply where the "run of the mine" case of this sort will be decided in the Illinois courts and governed by *Bishop*. If *Bishop* was wrongly decided, only the United States Supreme Court or the legislature can overrule it.

Egelhoff does not require this court to assume that *Blackburn* and *Wells* are incorrect, as it treats ERISA preemption in another context. *Land* is an earlier statement where the issue was not directly litigated, so it does not undermine *Blackburn* and *Wells*. Under these authorities, then, summary judgment as Wal-Mart has sought, is appropriate because Varco has money to which Wal-Mart has a superior claim. But because the Plan must bear its proportional share of Dunford's fee, Wal-Mart is entitled only to restitution net of its proportionate share of the legal expenses.

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whether petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been pre-empted by ERISA," *Great-West Life*, 534 U.S. at 204, 122 S. Ct. at 718.

[13] After the *Great West Life* decision, however, few cases will be decided in the federal courts. Only because the pending case arises in equity as a result of the unique circumstance in which Dunford distributed the settlement monies without the state court's blessing, is this case in federal court. Had this not occurred, under *Great-West Life* Wal-Mart's claim for reimbursement subject to the terms of the Plan would be a legal claim be in state court.

ORDER

Wherefore, for the reasons set forth above, Wal-Mart's motion for summary judgment is granted [# 12] in the form of restitution in the amount of $18,865.72 less Wal-Mart's proportionate share of Dunford's fee and Varco's costs, plus prejudgment interest. Counts III and IV of Wal-Mart's complaint are voluntarily dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2). The court dismisses Dunford as a defendant and Dunford's counterclaim against Wal-Mart under Federal Rule of Civil Procedure 21. Wal-Mart's motion to dismiss the counterclaim [# 52-1] and Dunford's motion for summary judgment on his counterclaim [# 47-1] are moot. The parties are directed to submit a proposed decree, consistent with this opinion, requiring restitution of a precise amount of money. The case is placed on the status call for Tuesday, October 29, 2002 at 9:30 a.m. at which time the parties shall appear should they be unable to agree on an appropriate form of order.

ENTER:

/s/
JOAN HUMPHREY LEFKOW
United States District Judge

Dated: October 2, 2002

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 01-C-8277
[Decided Jan. 14, 2002]

ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES HEALTH AND WELFARE PLAN,
Plaintiff,

vs.

CLARA VARCO and LAURENCE DUNFORD,
Defendants.

JUDGE: JOAN HUMPHREY LEFKOW, United States District Judge.

MEMORANDUM DECISION AND ORDER

This is an original action filed by Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan ("Wal-Mart"), a fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, asserting claims under

section 502(a)(3) of ERISA,[1] for "appropriate equitable relief," including an injunction, declaration of rights, specific performance, imposition of constructive trust, and restitution against defendants Clara Varco ("Varco") and her attorney, Laurence Dunford ("Dunford").[2] Jurisdiction is alleged under section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).[3] Both defendants have moved to dismiss the first amended verified complaint and have made several other motions.[4] Plaintiff has moved this court to stay proceedings in a related state court proceeding and to enjoin defendants from further adjudicating the matter in state court.[5] For the reasons set forth below, the

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[1] Section 502(a)(3) of ERISA provides that "[a] civil action may be brought . . . by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]" 29 U.S.C. § 1132(a)(3).

[2] Plaintiff also asserts claims Illinois common law of breach of contract by Varco and tortious interference of contractual relations by Dunford.

[3] With exceptions not applicable here, "the district courts of the United States . . . have exclusive jurisdiction of civil actions under this subchapter brought by . . . a . . . fiduciary . . . ." 29 U.S.C. § 1132(e)(1). *Administrative Committee v. Gauf,* 188 F.3d 767, 770 (7th Cir. 1999).

[4] Defendants' other motions include a motion to strike plaintiff's first amended verified complaint by Dunford and a motion to vacate the court's preliminary injunction by Varco.

[5] Due to the nature of the case and the language of the Anti-Injunction Act, 28 U.S.C. § 2283, the court addresses plaintiff's emergency motion as a motion to stay the state court proceedings

court grants in part and denies in part defendants' motions to dismiss, denies defendants' remaining motions as moot, grants plaintiff's motion to stay the state court proceedings on the ERISA matter, and grants plaintiff's motion to enjoin defendants from proceeding further in state court.

FACTS AND PROCEDURAL HISTORY

Varco at all relevant times was a participant in a health and welfare plan (the "Plan") provided by her employer and administered by Wal-Mart.[6] The Plan provides that it has a right to " recover or subrogate 100 percent of the benefits paid or to be paid by the Plan on your behalf and/or your dependents to the extent of . . . any judgment, settlement or any payment made or to be made, relating to the accident, including but not limited to other insurance." The Plan further provides that it "does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the participant." After an automobile accident with Kristopher Lapsis ("Lapsis") during September, 2000, Wal-Mart paid medical benefits on behalf of Varco in the amount of $34,034.55. Varco filed a tort action in the Circuit Court of Cook County, Illinois, against Lapsis, and in October, 2001, in contemplation of settlement, Varco by and through her counsel, Dunford, sought adjudication of various liens, including that of Wal-Mart. Wal-Mart asked the state court to postpone adjudication of its lien and on October 4, 2001, removed the state court case to this court. The Honorable James A. Alesia, relying on *Blackburn v.*

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and to enjoin defendants from further proceeding in state court to resolve the ERISA matter.

[6] Further background may be found in *Varco v. Lapsis,* 172 F. Supp. 2d at 987-88 (N.D. Ill. 2001).

Sundstrand Corp., 115 F.3d 493 (7th Cir. 1997), and *Speciale v. Seybold*, 147 F.3d 612 (7th Cir. 1998), held the case improperly removed and remanded it to the state court. *Varco v. Lapsis*, 172 F. Supp. 2d 985, 986-87 (N.D. Ill. 2001). On October 29, Wal-Mart filed this action. In early December, 2001, Dunford disbursed the settlement funds, while still subject to plaintiff's lien, to Varco and himself. Shortly thereafter, plaintiff sought emergency relief in this court to restrain defendants from further disposition of the funds until plaintiff's claim could be resolved. On December 14 and 21, 2001, this court granted plaintiff's motions for a temporary restraining order ("TRO") and preliminary injunction, respectively, because this court found that it had subject matter jurisdiction under *Administrative Committee v. Gauf*, 188 F.3d 767, 770 (7th Cir. 1999), and that plaintiff had a likelihood of success on the merits of a claim to impose a constructive trust[7] where plaintiff's counsel had disbursed the funds without an adjudication by *any* court of Wal-Mart's claim to share in the fund. On or about December 29, Dunford and Varco returned to state court with a motion to adjudicate Wal-Mart's lien. In response, plaintiff filed the motion which this opinion principally addresses: an emergency motion pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283, the All Writs Act, 28 U.S.C. § 1651, and "the *Princess Lida* doctrine" [8] to enjoin the state court from adjudicating plaintiff's right to reimbursement subject to the lien.

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[7] The court relied on *Wal-Mart Stores, Inc. Assocs.' Health and Welfare Plan v. Wells*, 213 F.3d 398, 403-04 (7th Cir.), *cert. denied*, 531 U.S. 985, 121 S. Ct. 441, 148 L. Ed. 2d 447 (2000).

[8] *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466-67, 83 L. Ed. 285, 59 S. Ct. 275 (1939).

On January 3, 2002, this court requested that Dunford ask the state court to continue the motion to adjudicate the lien to permit this court to consider plaintiff's emergency motion. On January 4, 2002, the state court continued the matter to January 11, noting its own jurisdiction over the remanded *Lapsis* case and specifically over Varco's petition to adjudicate the right of Wal-Mart to reimbursement. On January 10, 2002, this court entered an order to stay the state court proceedings and to enjoin defendants from further proceeding in state court. This opinion sets forth this court's reasoning for its order.

ANALYSIS

I. Subject matter jurisdiction

In opposition to plaintiff's motion, defendants contend that this court lacks subject matter jurisdiction because Wal-Mart is seeking monetary and not equitable relief under § 502(a)(3) and, in light of the remand of the *Lapsis* case to the state court, defendants believe they are entitled to have the state court adjudicate Wal-Mart's lien. The rule of *Blackburn* and *Speciale* is that a fiduciary of an ERISA plan is not entitled to remove a personal injury action to federal court on the basis that the state court's jurisdiction is pre-empted by ERISA, even though "conflict preemption" under section 514(a) requires the state court to apply federal law to issues governed by ERISA.[9] In *Speciale*, the court concluded, "In a state cause of action where there are adversarial claims to a

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[9] Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides, as relevant here, "The provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."

settlement fund between an ERISA plan subrogation claim and other statutory medical liens, there is no preemption under § 502(a) and the allocation of funds is a matter for the state court under which original jurisdiction arose." 147 F.3d at 616. Nevertheless, where a fiduciary of an ERISA plan files a complaint in federal court which states a claim for equitable relief, a federal court has exclusive jurisdiction to decide the claim. *Gauf,* 188 F.3d at 771*; see Spitz v. Tepfer,* 171 F.3d 443, 447 (7th Cir. 1999). Thus, the issue before this court is whether plaintiff's complaint states a claim for equitable relief.

Great-West Life & Annuity Insurance Company v. Knudson, 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635, 2002 U.S. LEXIS 399, 2002 WL 15399 (U.S. 2002), held that section 502(a)(3) does not authorize a suit by an ERISA plan against a beneficiary for reimbursement where the settlement funds (derived from the personal injury suit) had already been distributed to a special needs trust for the beneficiary's care, the beneficiary's attorney in the state court action, and lien holders (including a small portion to the plan). Specifically, the Court reasoned that a complaint under § 502(a)(3)(A) for an injunction requiring restitution could not be properly characterized as equitable relief but was actually a claim for damages for breach of contract. Defendants contend that this case is within *Great-West Life* and therefore must be dismissed. This court would agree but for the facts that, unlike in *Great-West Life*, Wal-Mart here claims that it is rightfully entitled to a portion of the settlement funds and has sued the individuals who have possession of them, and this court has assumed control of those funds by imposing a constructive trust by virtue of its preliminary injunction.

Defendants have argued that this court cannot impose a constructive trust because there was no *res* after Dunford

disbursed the funds to Varco and himself. The court disagrees. As stated in *Great West Life*,

> [A] plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) . . . to a plaintiff who was, in the eyes of equity, the true owner. But where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust . . . upon other property of the [defendant].' Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

2002 U.S. LEXIS 399, 2002 WL 15399, Part II, sec. B, P 3 (internal citations omitted). Where, as here, Dunford disbursed the settlement funds without obtaining adjudication of the lien in the state court and where Wal-Mart filed an original action to impose a constructive trust to avoid dissipation before its right to share in the fund could be adjudicated, a *res* exists over which this court has assumed jurisdiction. *See id.* This is a request for equitable relief and therefore this court has exclusive jurisdiction under 29 U.S.C. § 1132(e)(1).

II. Stay of state court proceedings

Wal-Mart relies on a variety of authorities in support of its position that this court should prevent the state court, which has before it Varco's belated motion to adjudicate Wal-Mart's lien, from proceeding. It cites to the "in aid of jurisdiction" exception in the Anti-Injunction Act, 28 U.S.C. § 2283, the "in aid of jurisdiction" authority in the All Writs Act, 28 U.S.C. § 1651, and the *Princess Lida* doctrine, from *Princess Lida of Thurn and Taxis v. Thompson et al.*, 305 U.S. 456, 466-67, 83 L. Ed. 285, 59 S. Ct. 275 (1939).[10] "This case is

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[10] The Anti-Injunction Act states "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

The All Writs Act states that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

The *Princess Lida* doctrine provides,

> It is settled that where the judgment sought is strictly in *personam*, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other. . . . On the other hand, if the two suits are *in rem*, or *quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other. . . . We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that

by no means an easy one." *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs,* 398 U.S. 281, 296, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970). The court is loathe to interfere with the proceedings in the state court. Nevertheless, courts have stayed or enjoined state court proceedings when the state court proceedings will frustrate the proceedings in the federal court.[11] *See In re Bankamerica Corp. Secs. Litig.,* 263 F.3d

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> jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. . . . The doctrine is necessary to the harmonious cooperation of federal and state tribunals. . . . While it has no application to a case in a federal court based upon diversity of citizenship, wherein the plaintiff seeks merely an adjudication of his right of his interest as a basis of a claim against a fund in the possession of a state court, . . . this is not such a case. No question is presented in the federal court as to the right of any person to participate in the res or as to the quantum of his interest in it. The contentions are solely as to administration and restoration of corpus.

Princess Lida of Thurn and Taxis, 305 U.S. at 466-67 (1939) (internal citations omitted).

[11] The court recognizes that stay or enjoinment of state court proceedings may appear to strain the principles of comity. *See Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996); *Propper v. Clark,* 337 U.S. at 493, 93 L. Ed. 1480, 69 S. Ct. 1333 (1949) ("Comity does not require abnegation to the extent that a federal court cannot adjudicate the rights to the claim involved."). In fact, the procedural posture of this case creates confusion for all parties, the

795, 802-03 (8th Cir. 2001); *In re Inter-Op Hip Prosthesis Prod. Liab. Litig.*, 174 F. Supp. 2d 648, 2001 WL 1540552, at *5 (N.D. Ohio, 2001); *In re Consol. Welfare Fund "ERISA" Litig., Dep't of Labor v. Goldstein*, 798 F. Supp. 125, 127 and n.3 (S.D.N.Y. 1992). Defendants rely on a variety of cases in which the state (or foreign) court had concurrent jurisdiction and the federal court refused to enjoin or stay those proceedings even though the risk of inconsistent outcomes existed. *See, e.g., National Basketball Ass'n v. Minnesota Prof'l Basketball, Ltd. P'ship*, 56 F.3d 866, 872 (8th Cir. 1995) (holding, in part, to reverse district court's relieving the NBA from the state court's preliminary injunction because "a preliminary injunction is a protectable judgment under the relitigation exception in § 22[8]3 "); *see also Atlantic Coast Line R.R. Co.*, 398 U.S. at 294-97 (stating that "the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts[.]"). Because this court has exclusive jurisdiction over the property, however, these cases are distinguishable. *See Green v. Green*, 233 F.2d 642, 644 (7th Cir. 1956) (holding that the federal court could enjoin a defendant from proceeding in state court because the federal court had *in rem* jurisdiction and control over the res); *see also Bowles v. Willingham*, 321 U.S. 503, 512, 88 L. Ed. 892, 64 S. Ct. 641 (1944) (holding in part that Congress established the federal district courts' exclusive jurisdiction to adjudicate certain matters under the Emergency Price Control Act); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 235, 67 L.Ed. 226, 43 S.

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state court and the federal court. Unlike the court in *Dailey v. The National Hockey League*, 987 F.2d 172 (3rd Cir. 1993), this court finds itself in the awkward position of having its jurisdiction questioned by a state court in adjudicating plaintiff's reimbursement subject to either ERISA or the lien.

Ct. 79 (1922) (upholding "that where an action is one in rem that court-- whether state or federal-- which first acquires jurisdiction draws itself the exclusive authority to control and dispose of the res, involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective courts are of equal rank."); *Goehring v. Harleysville Mut. Cas. Co.*, 460 Pa. 138, 145, 331 A.2d 457, 460 (1975); cf. Propper v. Clark, 337 U.S. 472, 491-91, 93 L. Ed. 1480, 69 S. Ct. 1333 (1949) (stating that "as the state court could reasonably require complete adjudication of the controversy, the District Court would perhaps be compelled to stay proceedings in the state court to protect its own adjudication. 28 U.S.C. § 2283."); *Levy v. Lewis,* 635 F.2d 960, 967 (2d Cir. 1980) (while holding that ERISA did not apply to the case, the court recognized that "federal courts must hear claims within their exclusive jurisdiction, for otherwise the right alleged would never fully be adjudicated.").

In light of cases such as *Bishop v. Burgard,* 317 Ill.App.3d 923, 251 Ill. Dec. 712, 741 N.E.2d 306, (3rd Dist. 2000), *on appeal*, 197 Ill. 2d 565, 747 N.E.2d 351 (2001), where the Illinois Appellate Court ruled that terms of the health and welfare plan superseded the Illinois common fund doctrine, and further where there is no great likelihood of inconsistent rulings had Dunford obtained adjudication of the lien rather than simply disbursing the funds, this court would take a different view. But because it became necessary for Wal-Mart to seek preliminary injunctive relief in this court, the court has assumed exclusive jurisdiction over the *res* and must require defendants to litigate in the federal forum. Because this is the only remaining issue pending before the state court, it is necessary to require the state court, in aid of this court's jurisdiction, to defer to the jurisdiction of the federal court.

ORDER

For the above-stated reasons, this court denies in part defendants' motions to dismiss plaintiff's first amended verified complaint [# 8-1] [# 10-2], insofar as it states a claim for imposition of constructive trust on particular property in the hands of the defendants and for the pendent state law claims, but grants in part defendants' motions to dismiss plaintiff's other claims for equitable relief. It denies defendants' remaining motions as moot, including Dunford's motion to strike plaintiff's first amended verified complaint [# 10-1] and Varco's motion to vacate the preliminary injunction. This court grants plaintiff's motion for this court to stay the state court proceedings and enjoin the defendants from further proceedings in state court [# 20-1] pursuant to its Order of January 10, 2002. All other motions are continued to January 21, 2002, at 9:30 a.m.

ENTER:

JOAN HUMPHREY LEFKOW
United States District Judge

Dated: January 14, 2002

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 1:01-CV-8277
[Filed Dec. 10, 2001]

ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN, Plaintiff,	)
v.	)
CLARA VARCO AND LAURENCE DUNFORD, Defendants.	)

FIRST AMENDED VERIFIED COMPLAINT

Plaintiff, Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan, pleads as follows:

1. This action to enforce the terms of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan (the "Plan") and for equitable relief arises under the Employee Retirement

Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*

PARTIES

2. Plaintiff is a fiduciary of the Plan and, as such, is entitled to bring this action pursuant to 29 U.S.C. § 1132(a)(3).

3. Upon information and belief, Defendant Varco is a citizen and resident of the State of Illinois.

4. Upon information and belief, Defendant Dunford is a citizen and resident of the State of Illinois.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332, and 29 U.S.C. § 1132 because this action to enforce provisions of the Plan arises under ERISA. Furthermore, under 28 U.S.C. § 1367, this Court has supplemental jurisdiction over all state law claims herein since such claims form part of the same case or controversy.

5. Pursuant to 29 U.S.C. § 1132(e)(2), venue is proper in this Court.

FACTUAL ALLEGATIONS

6. Defendant was a "Covered Person" under the terms of the Plan, which is self-funded.

7. Defendant Varco was injured in a personal injury accident in 2000, and sought to recover from the parties who caused those injuries.

8. In connection with the injuries suffered by Defendant, the Plan paid medical benefits on behalf of Defendant Varco in the amount of $34,035.55.

9. The Plan contains a reimbursement and right of recovery provision, which states:

RIGHT TO RECOVER OVERPAYMENT

Payments are made in accordance with the provisions of the Plan. If it is determined that payment was made for an ineligible charge or other insurance was considered primary, the Plan has the right to recover overpayment. The Plan will pursue overpayment from the party to whom the payment was issued. However, the Plan reserves the right to seek overpayment from you and/or your dependents if payment was made to the provider and the provider refuses to refund the Plan. Failure to comply with this request will entitle the Plan to withhold benefits due you and/or your dependents under the Plan Document. Furthermore, the Plan has the right to refer the file to an outside collection agency if internal efforts are unsuccessful.

RIGHT TO REDUCTION AND REIMBURSEMENT (SUBROGATION)

The Plan has the right to 1) reduce or deny benefits otherwise payable by the Plan and 2) recover or subrogate 100 percent of the benefits paid or to be paid by the Plan on your behalf and/or your dependents to the extent of any and all of the following payments:

- Any judgment, settlement, or any payment made or to be made, relating to the accident, including but not limited to other insurance.

- Any auto or recreational vehicle insurance coverages or benefits including, but not limited to, uninsured/underinsured motorist coverage.

- Business and homeowners medical and/or liability insurance coverage or payments.

- Attorney's fees.

Cooperation Required

The Plan requires that you or your covered dependent cooperate to guarantee reimbursement to the Plan from third party benefits. Failure to comply with this request will entitle the Plan to withhold benefits due you or your dependents under the Plan Document. You or your covered dependents may not do anything to hinder reimbursement of overpayment to the Plan after you have accepted benefits.

All attorney's fees and court costs are the responsibility of the participant, not the Plan.

These rights apply regardless of whether such payments are designated as payment for, but not limited to:

- Pain and suffering;
- Medical benefits;
- Other specified damages;

- Whether the participant has been made whole (i.e., fully compensated for his/her injuries).

Additionally, the Plan has the right to file suit on your behalf for the condition related to the medical expenses to recover benefits paid or to be paid by the Plan.

NOTES:

- If you reside in a state where personal automobile injury protection or medical payment coverage is mandatory, the Plan takes secondary status. The Plan will reduce benefits for an amount equal to, but not less than, that state's mandatory minimum personal injury protection or medical payment requirement.

- The Plan has first priority with respect to its right to reduction, reimbursement and subrogation.

- The Plan is secondary to any excess insurance policy, including, but not limited to, school and/or athletic policies.

- The Plan has the right to reduce or withhold future benefits payments for your claims and your dependents' claims.

- The Plan will not pay for future medical charges related to the accident until medical charges have exceeded all amounts that were recovered, that should have been recovered, or are to be recovered by or on behalf of the participant.

- The Plan's section regarding the right to reduction, reimbursement and subrogation applies to the associate and to covered dependents.

- The Plan has the right to recover interest on the amount paid out by the Plan relating to the accident.

- The Plan has the right to recover the amount paid out relating to the accident in a lump sum.

- The Plan does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the participant.

- The right of reduction, reimbursement and subrogation is based on the Plan language in effect at the time of judgment, payment, or settlement.

Participant's Responsibility Regarding Right of Reduction and/or Recovery

To aid the Plan in its enforcement of its right of reduction, recovery, reimbursement, and subrogation, the participant must, at the Plan's request and at its discretion:

- Take any action;
- Give information;
- Execute documents so required by the Plan.

Failure to aid the Plan and to comply with such requests may result in the Plan withholding or recovering benefits, services, payments, or credits due or paid by under the Plan.

> The Plan's right to reimbursement occurs when the Plan pays your charges relating to an accident while waiting for a third party to make payment to you or to someone else on your behalf. Repayment to the Plan of 100 percent will be made at the time the payment is received by you, your attorney, or other person on your behalf.

10. Defendant Varco has recovered $100,000.00 because of her injuries.

11. Varco was represented by Defendant Dunford.

12. Defendant Dunford was aware of the Plans' right of reimbursement. In fact, Dunford, despite filing of this lawsuit, settled all of Varco's claims and, according to Dunford, disbursed the settlement funds to himself and Ms. Varco despite the pendency of this action. A true and correct copy of correspondence between counsel for the Plaintiff and Defendant Dunford is attached as Exhibit A hereto.

13. To date, all Defendants have refused to reimburse the Plan in accordance with the Plan terms.

I. PRELIMINARY INJUNCTION

14. Pursuant to Fed.R.Civ.P. 65, upon notice and hearing, Plaintiff is entitled to a preliminary injunction enjoining Varco, and all those acting in concert or participating with her from disposing of $34,035.55 of the $100,000 in settlement funds, pending a final determination by this Court. If Defendant Varco is able to place these monies beyond the reach of Court, then Varco may deprive the Court of the ability to impose an equitable remedy.

II. ENFORCEMENT OF THE TERMS OF THE PLAN

15. Pursuant to 29 U.S.C. § 1132(a)(3),Plaintiff seeks equitable relief, including, but not limited to, an injunction, declaration of rights under the Plan, specific performance, constructive trust, and restitution against Defendant to enforce ERISA and the terms of the Plan.

16. By refusing to reimburse the Plan to the extent of benefits paid out of the amount she recovered, Defendants have violated the terms of the Plan.

17. Since these acts and/or practices violate the Plan's terms, this Court should enter an order requiring Defendants to reimburse the Plan in the amount of $34,035.55.

III. TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

18. Defendant Dunford is liable for tortious interference with contractual relations.

19. Specifically, Dunford willfully and intentionally interfered with the Plan's contractual relations with Defendant Varco. See Exhibit A hereto.

20. Defendants Dunford' s conduct in negotiating the settlement check and disbursing the funds to Varco or in failing to reimburse the Plan was a proximate cause of the Plan's damages.

21. The Plan has been damaged in the amount of $34,035.55. because of Defendant's conduct.

IV. CONVERSION

22. Defendant Dunford received the $100,000 for Defendant Varco. Defendant Dunford was aware of the Plans' entitlement to $34,035.55 prior to receiving the settlement payment for Varco. Defendant Dunford intentionally and wrongfully asserted dominion and control over the settlement payment, inconsistent with the Plan's ownership of its portion of the settlement payment.

V. PRAYER FOR RELIEF

Plaintiff requests that the Court enter an order granting a declaratory judgment, injunction, specific performance, constructive trust, and restitution against Varco, requiring Defendant Varco to turn over $34,035.55, including appropriate pre-judgment and post-judgment interest. Plaintiff also requests that the Court enter an order requiring Defendant Dunford to pay the Plan $34,035.55, including appropriate pre-judgment and post-judgment interest, and for any other relief to which the Plan is entitled and that the Plan be awarded reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 1132(g).

Date: December 7, 2001.

Respectfully submitted,
LAWRENCE & RUSSELL, LLP
5050 Poplar Avenue
Suite 1617
Memphis, Tennessee 38157
Telephone: (901) 844-4430
Facsimile: (901)844-4435

By:/s/_____
Thomas H. Lawrence
John M. Russell

Attorneys for Plaintiff Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan

VERIFICATION

I, Ann C. Cato, verify under penalty of perjury that the forgoing is true and correct.

/s/
Ann C. Cato

Executed on December 6, 2001.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Case No. 01-C-7695
[Decided Nov. 15, 2001]

CLARA VARCO and KIMBERLY SORIA, Plaintiffs,	)
v.	)
KRISTOPHER LAPSIS, Defendant.	)

JUDGE: James H. Alesia, United States District Judge.

MEMORANDUM OPINION AND ORDER

Before the court is plaintiff Clara Varco's ("Varco") motion to remand this action to the Circuit Court of Cook County, Law Division, for lack of subject matter jurisdiction. For the following reasons, the court grants Varco's motion to remand.

I. BACKGROUND

Wal-Mart Stores, Inc. ("Wal-Mart") provides its employees benefits through The Wal-Mart Stores, Inc.

Associates' Health and Welfare Plan (the "Plan"), a self-funded employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. The administrator of this Plan is the Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan. The Plan includes a provision stating that the Plan has a right to "recover or subrogate 100 percent of the benefits paid or to be paid by the Plan on your behalf and/or your dependants to the extent of ... any judgment, settlement or any payment made or to be made, relating to the accident, including but not limited to other insurance."

Varco was an employee of Wal-Mart and a participant in the Plan. On September 24, 2000, Varco and Kimberly Soria suffered injuries as a result of an automobile accident with Kristopher Lapsis ("Lapsis"). The Plan paid medical benefits on behalf of Varco in the amount of $34,034.55.

Varco filed a personal injury action against Lapsis in Illinois state court. In order to determine whether or not to accept a $20,000.00 settlement offer, Varco filed a motion to adjudicate liens in the state court. In her motion, Varco listed three providers, including "Blue Cross and Shield," who were claiming liens. On October 1, 2001, the Illinois state court judge entered an order determining the rights of some lienholders and continuing the matter as to Blue Cross/Blue Shield to October 12, 2001.

On October 4, 2001, the Wal-Mart Committee,[1] acting independently, removed the action to the federal district court under 28 U.S.C. §§ 1441(a), (b), and (c), maintaining that because the Plan was governed by ERISA, Varco's motion to adjudicate was completely preempted under § 502(a) of ERISA, 29 U.S.C. § 1132(a). Varco now moves to remand the action to the Circuit Court of Cook County, pursuant to 28 U.S.C. § 1447, asserting that this court does not have subject matter jurisdiction. The court agrees with Varco.

II. DISCUSSION

Speciale v. Seybold, 147 F.3d 612 (7th Cir. 1998), a nearly identical scenario to the immediate case, is directly controlling. In that case, the Seventh Circuit stated, "the determination of jurisdiction on removal involving an ERISA issue is based upon the well-pleaded complaint rule, the ERISA 'complete preemption' exception to that rule and the defense of 'conflict preemption' under ERISA." *Speciale,* 147 F.3d at 614 (citations omitted). Under 28 U.S.C. § 1441, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant ... to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). District courts have original jurisdiction over cases concerning a "federal question," that is, cases "arising under the

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[1] In its notice of removal, movant refers to itself as "Defendant, Blue Cross Blue Shield of Illinois." However, in its response in opposition to plaintiff's motion to remand, it refers to itself as "Defendant, Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan" and claims it was misnamed as Blue Cross in the motion to adjudicate liens. The court will refer to movant as "the Wal-Mart Committee."

Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

In determining federal jurisdiction, the court generally first reviews the plaintiff's complaint, because "it is a long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Speciale,* 147 F.3d at 614 (quoting *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 63, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987)). The issues raised in the plaintiff's complaint, not those added in the defendant's response, control the litigation. *Id.* (citing *Jass v. Prudential Health Care Plan, Inc.,* 88 F.3d 1482, 1482 (7th Cir. 1996)). The Supreme Court has emphasized that "the paramount policies embodied in the well-pleaded complaint rule [are] that the plaintiff is master of the complaint ... and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 398-99, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987). This prevents the defendant from controlling the litigation and obtaining a transfer to federal court by federal preemption when the defendant raises a federal question in the responsive pleadings. *Speciale,* 147 F.3d at 614-15.

As the Seventh Circuit pointed out in *Speciale*, the Supreme Court created an exception to the well-pleaded complaint rule where Congress has completely preempted a given area of state law. *Speciale,* 147 F.3d at 615 (citing *Avco Corp. v. Aero Lodge No. 735, etc.,* 390 U.S. 557, 20 L. Ed. 2d 126, 88 S. Ct. 1235 (1968)). Complete preemption permits "recharacterization" of a plaintiff's state law claim as a federal claim so that removal is proper. *Id.* Whether or not a cause of action has been completely preempted is determined by the intent of Congress. *Id.* The Supreme Court has

explicitly expanded the "complete preemption" exception to include all state actions falling within the scope of § 502(a) of ERISA.[2] *Id.* (citing *Taylor,* 481 U.S. at 67).

However, as the Seventh Circuit pointed out, there is a second federal "preemption" doctrine. *Speciale,* 147 F.3d at 615.

> This doctrine serves as a defense to a state law action but does *not* confer federal question jurisdiction. This doctrine is known as "conflict preemption." Conflict preemption is based upon § 514(a)[3] of ERISA. "Complete preemption" under § 502(a) encompasses all claims by a participant or beneficiary to *enforce his rights* under an ERISA plan whereas "conflict preemption" under § 514(a) preempts any state law

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[2] Section 502(a) of ERISA provides:

> A civil action may be brought --
>
> (1) by a participant or beneficiary --
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan ...

[3] Section 514(a) of ERISA provides:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

> that may "*relate to*" *an ERISA plan*, but is not a basis for federal jurisdiction.

Speciale, 147 F.3d at 615 (emphasis added).

As it argued in *Speciale*, the Wal-Mart Committee argues again that complete preemption under § 502(a) has occurred. However, following the Seventh Circuit's rationale in *Speciale* as explained below, the court finds this is not a case of complete preemption under § 502(a) but is rather merely conflict preemption under § 514(a). Therefore, there is no basis for federal jurisdiction here.

In *Speciale*, the plaintiff was an employee of Wal-Mart and a participant in Wal-Mart Stores, Inc. Associates Health and Welfare Plan. As a result of an automobile accident, she sustained injuries, and the Plan paid $54,051.07 toward the costs of her medical care. The plaintiff filed a personal injury action against the driver of the other car in Illinois state court and accepted $45,000 in settlement. The plaintiff then filed a motion to adjudicate liens in state court, listing sixteen providers, including Wal-Mart, who were asserting claims against the settlement fund.[4] Wal-Mart, acting independently, removed the action to the federal district court under 28 U.S.C. § 1441(b), maintaining that because the Plan arose

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[4] The plaintiff in *Speciale* filed her motion to adjudicate liens in state court after she settled her case. Here, Varco filed her motion to adjudicate liens in state court while still considering a settlement offer. However, this distinction in timing is irrelevant to the outcome of this case. As in *Speciale*, there is no evidence or allegation that the Wal-Mart Committee's subrogation right has been questioned. *See Speciale*, 147 F.3d at 617. All that remains here is a determination on the apportionment of the funds under state law. *See id.*

under and was governed by ERISA, the plaintiff's motion to adjudicate was completely preempted. The district court concluded that the claim was preempted under § 502(a) of ERISA, 29 U.S.C. § 1132(a),and entered judgment in favor of Wal-Mart. On appeal, the plaintiff argued that the district court did not have federal jurisdiction because the motion to adjudicate fell under her well-pleaded complaint which alleged a state law claim of personal injury, neither of which presented a federal question nor permitted complete preemption under ERISA. The Seventh Circuit agreed with the plaintiff and reversed and remanded the case to the district court with directions to remand the case to state court for lack of federal subject matter jurisdiction. *Id.* at 617.

In its decision, the Seventh Circuit held that there was no federal subject matter jurisdiction because the plaintiff's request for apportionment could not be recharacterized as a suit to enforce her rights under the terms of the Plan, and therefore it was not completely preempted under § 502(a). *Id.* at 616. The court explicitly held that "in a state cause of action where there are adversarial claims to a settlement fund between an ERISA plan subrogation claim and other statutory medical liens, there is no preemption under § 502(a) and the allocation of the funds is a matter for the state court under which original jurisdiction arose." *Id.* In so finding, the court reasoned that although the plaintiff was entitled to bring a claim under the Wal-Mart plan, "her claim of personal injury was not a cause of action that falls within the scope of an ERISA provision nor did her state law claim require resolution of an interpretation of the contract governed by federal law." *Id.* at 615.

In its reasoning, the court in *Speciale* discussed *Blackburn v. Sundstrand Corp.*, 115 F.3d 493 (7th Cir. 1997), another

nearly identical scenario to the immediate case.[5] As discussed in *Speciale*, in *Blackburn*, two beneficiaries of an ERISA plan were injured in an automobile accident. *Speciale*, 147 F.3d at 616 *(citing Blackburn,* 115 F.3d at 494*)*. They filed suit in an Illinois court against the driver of the other car and accepted a settlement. *Id.* Two parties had claims against the settlement fund, the Blackburns' attorney and their ERISA welfare benefit plan. *Id.* The Blackburns filed a petition in state court to apportion the fund. *Id.* The fund administrator removed the case to federal court under 28 U.S.C. § 1441(b). *Id.* The Seventh Circuit "stated most emphatically that removal under ERISA preemption was improper based upon the well-pleaded complaint rule and the determination that 'not even the most expansive reading of ERISA covers motor vehicle collisions, just because part of the recovery may inure to the benefit of

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[5] The Wal-Mart Committee attempts to distinguish *Blackburn* and *Speciale* by arguing that these two cases involved removal under § 1441(b), not § 1441(c). Section 1441(c) of Title 28 permits removal "whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action[.]" The Seventh Circuit has stated that "claims are not 'separate and independent' if the wrongs arise from an interlocked series of transactions, i.e., they substantially derive from the same facts," even if more than one wrong is involved. *Lewis v. Louisville & Nashville R.R. Co.,* 758 F.2d 219, 221 (7th Cir. 1985). Here, the court finds that Varco's motion to adjudicate liens is not sufficiently "separate and independent" from the original claim as required for removal under Section 1441(c). Therefore, removal under § 1441(c) is improper in this case, and the Wal-Mart Committee cannot distinguish *Blackburn* and *Speciale* on this basis. In addition, removal under diversity jurisdiction and § 1441(a) would have been impossible here because the amount in controversy is far below the $75,000 required for diversity jurisdiction. *See Speciale,* 147 F.3d at 616 n.5.

a plan." *Speciale,* 147 F.3d at 616 (quoting *Blackburn,* 115 F.3d at 494).

Here, as in *Speciale* and *Blackburn*, the element of § 1331 "federal question" jurisdiction arose for the first time in non-defendant Wal-Mart Committee's notice of removal. *Speciale,* 147 F.3d at 616. As in both those cases, the Wal-Mart Committee removed the motion to adjudicate under 28 U.S.C. § 1441(b), which allows removal from state court to federal court for "any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States."[6] As

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[6] As the Seventh Circuit noted in *Speciale*, although the issue of the Wal-Mart Committee's removal under § 1441(b) was not raised by Varco, it is necessary to clarify the fact that the Wal-Mart Committee's removal was procedurally defective. *See Speciale,* 147 F.3d at 616 n.4. A prerequisite to removal under § 1441(b) is § 1441(a), which allows for removal to a district court, "by the defendant or the defendants...." 28 U.S.C. § 1441(a). Unless all defendants consent to removal, or the petition explains why the other defendants have not consented, the removal is considered defective. *Speciale,* 147 F.3d at 616 n.4. Here, the Wal-Mart Committee argues that Varco's motion to adjudicate liens could have been brought as a separate action, and therefore this claim was removable as a separate and independent claim under 28 U.S.C. § 1441(c), which does not require all defendants to join in the notice of removal. *Id.* However, as explained earlier, removal of this case under § 1441(c) is improper because Varco's motion to adjudicate liens is not sufficiently "separate and independent" from the original claim as required for removal under Section 1441(c). Therefore, § 1441(c) is inapplicable and the Wal-Mart Committee needed the consent of all defendants to remove this case. As the Seventh Circuit articulated in *Speciale*,

> Wal-mart, although not a 'defendant' per se, but if viewed as a type of 'intervening defendant,' failed to comply with

the Seventh Circuit stated in both *Speciale* and *Blackburn*, a tort suit based on a personal injury claim arising from an automobile accident does not arise under the Constitution, treaties, or laws of the United States. *Speciale*, 147 F.3d at 616 (citing *Blackburn*, 115 F.3d at 494). Therefore, here, as in *Speciale* and *Blackburn*, "the petition to apportion the fund invoked the ancillary jurisdiction of the state court and was part of that original, non-removable action." *See id.* Therefore, Varco's motion to adjudicate does not present a federal question under 28 U.S.C. § 1331, and her case was improperly removed to federal court under 28 U.S.C. § 1441(b).

Further, *Administrative Committee v. Gauf*, 188 F.3d 767 (7th Cir. 1999), does not alter this conclusion. In *Gauf*, the defendant, Patricia Gauf, was injured in an automobile accident. *Gauf*, 188 F.3d at 768. As an employee of Wal-Mart, she was covered under Wal-Mart's Associates' Health and Welfare Plan. The Plan reimbursed Gauf for her medical treatment on the condition that Gauf reimburse the plan to the extent of any judgment or settlement received relating to the accident. In a separate tort action against the driver of the other automobile involved in the accident, Gauf received a verdict in her favor and collected $36,000. Subsequently, the plaintiff, the Administrative Committee of the Associates' Health and Welfare Plan, filed a separate lawsuit in federal court, seeking an order compelling Gauf to reimburse the

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> procedural requirements. Wal-Mart was one of [several] lienholders named in the plaintiff's motion to adjudicate. However, Wal-Mart filed the removal notice independently, without the consent or cooperation of the remaining ... lienholders. Removal, therefore, was not procedurally appropriate.
>
> *Speciale*, 147 F.3d at 616 n.4.

Plan for the benefits it had paid to her relating to the accident. The plaintiff based its claim on the ERISA governed plan. *Id.* The court in *Gauf* found that there was federal jurisdiction over the plaintiff's action because the complaint stated a claim under ERISA's civil enforcement provision, § 502(a)(3). *Id.* at 771. In so finding, *Gauf* distinguished its decision from *Speciale* and *Blackburn*. Specifically, the court stated,

> *Blackburn* and *Speciale* do not govern the case that we have before us today. As we already noted, unlike the situations in those cases, the complaint here states a claim under ERISA § 502(a)(3), and is therefore within our jurisdiction. In *Blackburn* and *Speciale*, there were no such federal claims under ERISA § 502(a)(3) or otherwise; the claims removed were state claims (a tort action and a motion to adjudicate liens).

Id. at 771. Here, unlike *Gauf*, and like *Blackburn* and *Speciale*, the Wal-Mart Committee invokes § 502(a)(3) of ERISA as a defense to plaintiff's motion. Therefore, federal jurisdiction does not govern that defense.[7]

In sum, this case was improperly removed to federal court, and the court grants Varco's motion to remand this case to the Circuit Court of Cook County.

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[7] In its response in opposition to Varco's motion to remand, the Wal-Mart Committee notes that, "out of an abundance of caution," it has filed an independent action in federal court against Varco under ERISA to enforce the terms of the Plan. (Resp. at 2 n.2.) In contrast to the current case, there may be federal jurisdiction over the Wal-Mart Committee's independent action if the complaint states a claim under ERISA's civil enforcement provision, § 502(a)(3). *See Gauf*, 188 F.3d at 771.

CONCLUSION

For the foregoing reasons, the court grants Varco's motion to remand this case to the Circuit Court of Cook County, Law Division.

Date: NOV 15 2001

APPENDIX H

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION

[Filed Sept. 19, 2001]

Clara Varco & Kimberly Soria, Plaintiffs,	)	
Vs.	)	No: 00 L 12201 E
Kristopher Lapsis, Defendant.	)	

MOTION TO ADJUDICATE LIENS

NOW COMES the plaintiffs, Clara Varco and Kimberly Soria, by their attorney, Laurence J. Dunford, and move this Court adjudicate the liens of the health insurance carriers, medical providers and medical payments insurer and, in support thereof, state as follows:

1. That the plaintiffs Clara Varco and Kim Soria were involved in an auto collision out of which this matter arises.

2. That the defendant, Kristopher Lapis, has a policy which provides coverage with limits of $20,000 per person and $40,000 per accident.

3. That the carrier has offered its limits of liability.

4. The All-State Insurance has a policy of Insurance which provides $5,000 medical payments coverage and that All-State has paid out its full coverage for each plaintiff(total $10,000.00)

5. That Clara Varco was an insured under a policy which was issued by Blue Cross and Blue Shield of Illinois and that they paid $34,034.55 on her behalf.

6. That Advance Physician's Group has an outstanding bill of $2,405.05 for services rendered to Ms. Varco.

7. That Kim Soria was covered by Aetna Insurance Company for health coverage and Aetna Has paid the sum of $5090.80.

8. That Advance Physician's Group has an outstanding bill of $1,893.44 for services rendered to Ms. Sofia.

9. That Laurence J. Dunford has expended $1,202.434 expenses which are common to each plaintiff and for investigation and filing fees which should be split equally between the plaintiffs and the lien holders. Additionally, Laurence J. Dunford has incurred $204.30 expenses for records of Kim Soria and $ $174.30 for Clara Varco records.

10. That Laurence J. Dunford is entitled to fees of 1/3 of the recovery under the common fund doctrine established by the case of *Baier v. State Farm.*

11. That the Statutes of the state of Illinois provides that liens cannot exceed 1/3 of the recovery.(6333.33 each plaintiff)

12. That the offer of $20,000.00 for each individual was secured through the efforts of Laurence J. Dunford and the liens should be reduced by 1/3.

13. That a fair and equitable award to the lien holders would be a pro-rata share of the 1/3.

14. That as to Clara Varco, the total liens claimed are $41,538.60 by the three lien claimants (BCS-$34,034.55 [81.9%], All-State-$5,000[12.0%] and Advance Physicians has balance of $2,504.05 [6.1%])

15. That as to Kim Soria, the total liens claims are $11,984.24 by the three lien claimants (Aetna-$5,090.80[42.5%], All-State- $5,000.00[41.7%] and Advance Physicians has balance of $1,893.44[15.8%].

16. That there is $5,845.37 available for distribution (6333.33-400.81[1/3 common expenses]-87.15[1/2 of the medical record expense] from the settlement of Clara Varco.

17. That as to Clara Varco's settlement, the $5,845.37 should be distributed $4,787.36 to Blue Cross and Shield ($ 5845.37 * 81.9%); $701.44 to AllState ($ 5845.37 * 12.0%) and $ 356.57 to Advance Physicians Group ($ 5845.37 * 6.1%).

18. That there is $5,830.37 available for distribution (6333.33-400.81[1/3 common expenses]-102.15[1/2 of the medical record expense] from the settlement of Kim Soria.

19. That as to the settlement of Kim Soria, the $5,830.37 should be distributed $2,477.91 to Aetna Insurance ($5830.37 * 42.5%); $2,431.26 to All-State ($5830.37 * 41.7%) and $921.20 to Advance Physicians Group ($5830.37 * 15.8%).

Wherefore, Kimberly Soria and Clara Varco, by their attorney, Laurence J. Dunford, pray this court adjudicate the liens of the medical providers and the healthcare providers in accordance with the above calculations.

/s/ Laurence J. Dunford
Attorney for Plaintiff

Attorney Code: 20186
Laurence J. Dunford
Attorney for Plaintiff
39 South LaSalle Street Suite 610
Chicago, Illinois 60603
312-782-7482

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Filed October 4, 2001]

CLARA VARCO & KIMBERLY SORIA, Plaintiffs,	)
v.	)
KRISTOPHER LAPSIS, Defendant.	)

DEFENDANT BLUE CROSS BLUE SHIELD OF ILLINOIS' NOTICE OF REMOVAL

Defendant, Blue Cross Blue Shield of Illinois ("Defendant"), hereby removes this action to this Court pursuant to 28 U.S.C. §§ 144l(a), (b), and (c) and, in support thereof, states as follows:

1. On or about September 27, 200t, Defendant received a copy of a Motion to Adjudicate Liens, Notice of Motion, mad an Amended Motion to Adjudicate Liens in an action styled *Clara Varco & Kimberly Soria, Plaintiffs vs. Kristopher Lapsis,* Defendant, Case No. 00 L 12201 E pending in the Circuit Court of Cook County, Illinois, County

Department, Law Division. The Petition seeks an order reducing the lien held by the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan (the "Plan"). Defendant is the third-party administrator for the Plan. The Plan, which is covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), provides for full reimbursement where participants are injured because of third parties, receive benefits because of those injuries, and make a second recovery, for the same injuries, from a third party. A copy of the foregoing document is attached hereto as Exhibit A hereto and constitutes all pleadings, process, and other documents served upon Defendant in this action. This document was the initial paper served upon Defendant setting forth the claim upon which such action or procedure is based.

2. This action is removable pursuant to 28 U.S.C. 1331 and 1441. Plaintiff Clara Varco asserts claims which raise substantial questions of federal law and which arise out of federal law. Plaintiff Varco seeks to have the state court determine enforceability of the reimbursement provision of a self- funded, ERISA-governed, employee welfare benefit plan against the monies Plaintiff has received from the third parties-responsible for her injuries. Plaintiff's claims relate to benefits that Plaintiff received under the Plan, an employee benefit plan as defined and described in 29 U.S.C. § 1001(1) and § 1003(a). Plaintiff received benefits under the Plan in the amount of $34,034.55.

3. Plaintiff Varco's claims further relate to the employee benefit plan within the meaning of ERISA, 29 U.S.C. § 1001; *et seq.*, and are preempted and superseded by 29 U.S.C. § 1144(a).

4. This action is removable pursuant to the complete preemption doctrine without regard to the well-pleaded

complaint rule. *Metropolitan Life Insurance Co., v. Taylor,* 481 U.S. 58 (1987).

5. This Court has original jurisdiction of ERISA actions under 29 U.S.C. § 1132(e). This action is founded on claims or rights arising under the laws of the United States in that it is based upon and requires the application of ERISA, 29 U.S.C. § 1144(a). Removal jurisdiction exists under 28 U.S.C. § 1441 (a), (b), and (c).

6. The reimbursement provision applicable to Plaintiff requires 100% reimbursement and specifically establishes that the Plan is not responsible for paying Plaintiffs' attorney's fees and costs. A true and correct copy of the reimbursement provision is attached hereto as Exhibit B.

7. Resolution of Plaintiff Varco's claim for relief requires the Court to construe the terms of an ERISA plan. Specifically, the Court must construe the reimbursement provision contained in the Plan to determine the parties' rights in this action.

8. Because the Plan specifically states that Plaintiff Varco's attorney's fees and costs are not the responsibility of the Plan, the Illinois Common Fund Doctrine is preempted by ERISA in this action and, thus, removal of this action is proper. *See McCotter v. Longo,* No. 95C5985, 1997 U.S. Dist. LEXIS 15357 (N.D. Ill. Sept. 30, 1997) (copy attached hereto as Exhibit C).

9. Plaintiff Varco's claim for a declaration of rights under the Plan could have been brought as a separate action. Plaintiff Varco's claim against Defendant is therefore removable as a "separate and independent claim." 28 U.S.C.

§ 1441(c); *Bond v. Reliance Insurance Co.*, 433 F. Supp. 243, 248 (D. N.J. 1977) (claim is separate and distinct if the claim could have been the subject of an independent action by itself, and without being joined or consolidated with others.). Therefore, the entire action is removable pursuant to 28 U.S.C. § 1441(c). Because removal is proper under 28 U.S.C. § 1441 (c), not all defendants are required to join in this Notice of Removal. *Thomas v. Shelton,* 740 F.2d 478,483 (7th Cir. 1984).

10. This Notice of Removal was timely filed pursuant to 28 U.S.C. § 1446(b), having been filed within thirty (30) days after service of Exhibit A.

11. Venue is proper in this Court.

12. Pursuant to 28 U.S.C. § 1446(d), Defendant will promptly give written notice of the removal of this action to all parties and will file a copy of this Notice with the state court.

WHEREFORE, Defendant removes this action to this Court.

Respectfully submitted,
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